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FROM

THE QUARTERLY JOURNAL
OF ECONOMICS

Canada – Extradition Commissioner

IN THE MATTER OF THE APPLICATION

OF

The United States of America

FOR

THE EXTRADITION OF

JOHN F. GAYNOR AND BENJAMIN D. GREENE

I. JUDGMENT AND OPINION OF
ULRIC LAFONTAINE, ESQUIRE
EXTRADITION COMMISSIONER
COMMITTING THE FUGITIVES FOR SURRENDER
JUNE 6th, 1905

II. Judgment of the JUDICIAL COMMITTEE of the PRIVY COUNCIL maintaining Judge Lafontaine's Jurisdiction and reversing Judge Caron's Judgment.

III. Judgment of the COURT OF APPEAL of the Province of Quebec maintaining Judge Lafontaine's Jurisdiction and confirming Judge Davidson's Judgment.

MONTREAL, CANADA
1905

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Canada - Extradition Commissioner.

Quarterly Journal of Economics.
I.

CANADA:
PROVINCE OF QUEBEC,
District of Montreal.
City of Montreal.

The Extradition Act

THE UNITED STATES OF AMERICA,

Applicants for Extradition.

vs.

JOHN F. GAYNOR AND BENJAMIN D. GREENE,

Fugitives from Justice.

Judgment and opinion of Ulric Lafontaine, Esquire, Extradition Commissioner, given at Montreal, Canada, 6th June, 1905.

Mr. Donald Macmaster, K.C., and Mr. Gustavus G. Stuart, K.C., instructed by the Honourable Marion Erwin, Special Assistant to the Attorney-General of the United States, appeared for the American Government; the Honourable T. Chase-Casgrain, K.C., and Mr. L. A. Taschereau, K.C., for the fugitives.

Mr. Lafontaine, Extradition Commissioner, read the following opinion:—

Benjamin D. Greene and John F. Gaynor, prisoners in this case, are charged by the United States of America with having, within the jurisdiction of the said United States of America, to wit, within the Eastern Division of the South-

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ern District of Georgia, on or about July 1st, 1897, participated in fraud then and there committed by Oberlin M. Carter, a disbursing officer, agent and trustee in the employment of the Government of the United States of America:

(*a*) By entering into a corrupt agreement (conspiracy) with the said Oberlin M. Carter, the officer and agent, to defraud the said United States in the discharge of the duties of his office and employment, by which agreement the said agent transferred his honest services, which he was in duty bound to give, from the United States, his principal, to the conspirators, the said Benjamin D. Greene and John F. Gaynor and others, so that the United States by the agreement itself, lost what it was entitled to have, his honest services as a public officer and agent to its injury.

(*b*) By jointly with said Oberlin M. Carter, the officer, agent and trustee of the United States, causing to be made and presented to said Carter as such officer, and agent, fraudulent claims against the Government of the said United States for his approval and payment, to the amount of $575,749.90, knowing the same to be fraudulent.

2. And did, on or about July 6th, 1897, within the Eastern Division of the Southern District of Georgia, in the United States of America, participate in the embezzlement then and there committed by Oberlin M. Carter, a disbursing officer, agent and trustee in the employment of the Government of the United States, of the sum of $575,749.90 of the public moneys of the United States, then and there intrusted to said Oberlin M. Carter as such officer and agent:

(*a*) By soliciting, counselling, moving, aiding and procuring said Oberlin M. Carter, the officer, agent, and trustee intrusted with said public money of the United States knowingly to apply the same to a purpose not prescribed by law, to wit, to the payment of fraudulent claims against the Government of the United States, to the amount of $575,749.90.

(*b*) By knowingly having applied the said sum of $575,749.90 of the public money of the said United States, received by them from said Oberlin M. Carter, as such officer, agent, and trustee, knowing the same to have been fraudulently obtained by said Carter, to the payment of fraudulent claims against the Government of the United States, to the amount of $575,749.90, by them caused to be presented to said Oberlin M. Carter for approval and payment by him as such officer, agent and trustee, that being an application of said money for a purpose not prescribed by law.

3. And did, on or about July 6th, 1897, knowingly and unlawfully receive from Oberlin M. Carter the sum of $575,749.90 of the money and property of the United States, knowing the same to have been fraudulently obtained by said Oberlin M. Carter, and did thereafter have in their possession said money and property, or a part thereof, within the said Eastern Division of the Southern District of Georgia, knowing the same to have been fraudulently obtained as aforesaid.

The evidence shows that Oberlin M. Carter, Captain in the Corps of Engineers of the United States Army, was, on the 6th July, 1897, and had been for many years previous, in local charge for the United States of the Engineering District of Savannah for improvement by the United States of rivers and harbours, having succeeded in that office on the 24th April, 1888, to General Gillmore, to whom he had been the Assistant Resident Engineer at Savannah since August 19th, 1884. As such public officer and engineer, he had extensive powers, duties and discretion in the letting of contracts for the United States for work on improving rivers and harbours in the said District of Savannah; in the superintendence and supervision of the work done by contractors; in the approval of just claims and accounts, and in the rejection of unjust claims and accounts presented to him by such contractors for work claimed to have been done, and also as a disbursing officer and agent of

the United States, in the obtaining of money from the United States for the payment of such claims, so presented to him for approval and payment by contractors out of the moneys of the United States entrusted to him for the payment of such claims.

The salary of Carter in 1890 was $2,208 and on July 6th 1897 it was about $3,000.

On the 8th October 1896 The Atlantic Contracting Company, of which the accused were the principal and leading members, a company incorporated in West Virginia, July 22nd, 1892, incorporators John F. Gaynor 2993 shares, $14,965; Benjamin D. Greene, 2992 shares $14,960; William T. Gaynor, 5 shares $25; A. H. Greene 5 shares, $25; J. E. Chandler, 5 shares $25, entered with the United States represented by the said Oberlin M. Carter, in his said official capacity, into contracts number 6,515 and number 6,517, for improving the Harbour of Savannah, Georgia (constructing training walls, closing dams or break-waters) and for constructing jetties at entrance to Cumberland Sound, Georgia.

In the execution of these two contracts work was commenced by the said Atlantic Contracting Company in December 1896, and as there was no specific appropriation for that work then, claims for work done were only presented on July 1st 1897. These claims aggregated $575,749.90; $345,000 being for work done at Cumberland Sound, and $230,749.90 for work done at Savannah Harbour, and were approved that day by Captain Carter, who immediately demanded from the Treasurer of the United States the necessary funds to pay them, and the amount required was put to the credit of Captain Carter in New York by the Treasurer of the United States, and payment was effected on July 6th 1897 by two cheques signed by Oberlin M. Carter dated Savannah, July 6th 1897, to the order of The Atlantic Contracting Company, one for $345,000 and the other for $230,749.90, and both endorsed "The Atlantic Contracting Company, John F. Gaynor, President, for deposit B. D. Greene," the two accused in this case.

Shortly afterwards Captain Carter left the United States for England, as he had been appointed attache to the United States Embassy in England, and he was succeeded by Captain Cassius E. Gillette, of the Corps of Engineers of the United States Army, who entered into his office at Savannah on July 20th 1897.

As already mentioned, the work to be done under the present contracts was improving the harbour of Savannah, Georgia, by constructing training walls, closing dams, or break-waters, and constructing jetties at the entrance to Cumberland Sound, Georgia. The specifications for the execution of this work, and the contracts, contained three different designs of log and brush mattress, and of brush mattress, one of them, the third, of value greatly inferior to the two others, because for its building it required much less material and a great deal less time and labour, and consequently was to a great extent less expensive to the contractors, and of much less value to the United States. In the specifications for these contracts it was stipulated that any one of these three designs could be called for by the engineer in charge, who had the selection, and that only one price should be tendered for the three designs of mattress by intending bidders.

The result of this condition was to make it imperative for the prudent bidder to state a price high enough to cover the most expensive design of mattress, in case it would be called for by the engineer in charge. The price for mattresses of any design in these two contracts was $3.80 per cubic yard for Savannah Harbour and $4.40 per cubic yard for Cumberland Sound.

The third design of mattress, that is, the one most economical in material and labour to the contractors and of less value to the United States was called for by Carter in both instances.

Shortly after his arrival at Savannah, Captain Gillette went to Cumberland Sound to inspect the work. He saw a brush construction brought out on a lighter. This brush construction did not correspond to any of the designs men-

tioned in the specifications, and in the contracts of 1896. The nearest it came to corresponding with any design was the third one, but it did not by far, as to construction, dimensions, quantity and quality of material used, comply with the specifications. Upon seeing this brush construction, Captain Gillette gave instructions to some inspectors to have a mattress made which should consist of four mattresses according to the specifications, third design, piled one on top of the other. For the same number of square yards, the first mattress which was inspected by Captain Gillette did not contain over one third of the material in the same number of square yards of the mattress which was ordered to be made by him according to the specifications of the third design—not over one third. The first brush mattress that Captain Gillette inspected, and others of the same kind, to his personal knowledge, went into the work.

Here is a resume and extracts of the deposition of Captain Gillette, which is extremely important as showing the manner in which the 1896 contract for Cumberland Sound was executed: also of depositions of other witnesses and of the evidence generally.

CAPTAIN GILLETTE'S DEPOSITION.

In Captain Gillette's deposition he says that there were three designs of mattress specified in contract 4960, October 22nd, 1892, and in contracts of 8th October, 1896, with The Atlantic Contracting Company. The first design was a log and brush mattress; the second design was a mattress of brush fascines, consisting of a layer of fascines on top of a grillage, and on top of that, a layer of fascines at right angles tc those, six feet apart and over that another grillage. The third design was also a brush mattress and had ten per cent. less material than the second, and the construction of the second design is much more carefully and fully specified. It is much the more expensive method to construct.

As a bidder between these two designs, he would have had to bid on the second design, the designs being left to the

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choice of the engineer, for two reasons: one, there is more brush, and the other is, it is required to be built in a much more expensive way. Under the specifications there is more brush, more fascines, more lineal feet of fascines, and more labour in the second design than in the third. The second layer of fascines spaced six feet apart does not exist in the third design, and does in the second.

The fascine in the second design shall be made as one continuous fascine, extending clear across the mattress, the brush being laid to break points. That requirement is not in the third design, and would be followed necessarily by more brush in each lineal foot of fascine, and a great deal more labour to construct it.

The second design containing ten per cent. more lineal feet of fascines, which fascines contain more brush to the lineal foot, and which fascines would have to be constructed on the shore, or upon ways built upon the lighters, whereas the third design can be built of fascines of any length, the fascines can be made in the woods where the brush is cut, the total cost of a square yard of mattress of the second design would be at least 25 per cent. more than the third.

The price of the third design in contract No. 4960, 22nd October, 1892, Atlantic Contracting Company is 95 cents per square yard, or $3.80 per cubic yard, while the price for the same mattress in contract 4224 of November 5th, 1890, was $1.40 per cubic yard.

There is nothing to indicate any difference in the cost of manufacture of these two kinds of mattress.

The following table shows the cost of fascines or brush mattresses under the various contracts from 1884 to 1897:—

Captain Gillette went to Cumberland Sound soon after taking charge for the purpose of inspecting the work.

He says (page 473):—"I went there and made an inspection, and after a time, about a day, the contractors brought out a brush construction on a lighter or barge; a decked barge. It was placed on a superstructure which had been built on the deck of the barge. This superstructure consisted of a parallel set of hewn timbers spaced three or four feet apart cross-wise of the barge. They were horizontal in position and about four or five feet above the deck, so arranged and supported that they could be tipped to an inclined position so that anything placed upon them would slide off with a little assistance. On top of that was a rectangular—was a pile of brush, rectangular in shape, about 8 feet high, the sides being square, the ends also being square, but in two sections two steps about four feet deep. That is the rise of each step was about four feet, and what you might call the tread of the step was about ten feet. The structure at a casual inspection appeared to be just a mass of irregularly placed brush; you could not see much system about it. I did not notice any rope or wire or strings fastening the brush into bundles at first, but I believe on careful examination, a semblance of bundles I discovered. Sticking out from the sides of the mattress were small pine poles, some of them as large as four inches I should think, at the butts, some of them as small as an inch and a half at the small ends. On top of the brush could be distinguished a grillage of these poles placed about 8 feet apart. Separate poles where they were spliced were simply spliced by lapping and wiring. There were evidences of a similar grillage on top of each of the lower steps I spoke of at the ends of the mattress or brush construction. The brush was very loose; it stuck out in such an irregular manner from ends, sides and top of the mattress as to almost conceal any systematic construction. In attempting to walk across it, I found it was impracticable or very difficult except by walking a pole. At nearly every step I would go in the full length of my legs.

To determine the thickness of the structure, the assistant engineer and the inspector, under my personal and immediate supervision, took a sounding pole, a round pole about one and three quarter inches, or two inches in diameter. The assistant engineer went on top of the mattress and at various places shoved this pole bodily through the structure. The inspector underneath called out when the end of the pole was even with the bottom of the mattress. The thickness of the mattress was then read off by the assistant engineer by the reading on the pole, just as if he were making a sounding in water.

Q.—(By Mr. Rose). Won't you give the names of these people, to save trouble?

A.—The Assistant Engineer's name was Marion Twiggs. The inspector was John M. Hall. In selecting the point at which this pole was pushed through the mattress, the upper surface was conceived as being divided, or was actually divided by the poles and imaginary lines between them, and at the angles of these squares, the pole was thrust through. It was not necessary to hunt around to find a place where the pole would go through. It could be put through with very little trouble at any point, and only once or twice did Mr. Twiggs have to change the location where he first started. The pole on those occasions struck something which would not let it go through. I then had the mattress photographed by Mr. Hall..... The thickness of the mattress as determined by the sounding pole averaged 7-9/10 feet, as I remember it.

Q.—(By Mr. Erwin). Go ahead and state what else you found out at that time about the mattress and anything in connection with the construction of the mattress, in regard to its corresponding with the specifications and how they were being turned in?

A.—After carefully inspecting the mattress, a fact which would not have occurred to me except had my attention been attracted to it, I found that the mattress was divided by horizontal poles which could be discovered sticking out of

the sides and ends, into eight layers which I computed at the time under the system of payments per square yard, that being designated as an eight course mat, that the structure would cost the Government at contract prices something over $3,600. It was by measurement at the time fifty feet short dimension. — — —

The Commissioner:—Fifty feet what?

Witness:—Fifty feet dimension on the short side across the ends, and the longer dimension was 80 feet on the bottom —100 feet on the bottom, and 80 feet as I remember it at the top, the difference being the two steps of which I spoke. The mattress was not at all as I understood the specifications. I tried to get a copy of the specifications on the work, but I could not find one; I could not get them from the assistant engineer or from the inspector; they had none; but as I remember the mattress it was a single mattress made of closely compacted brush fascines, and this structure was designated, I found in the report, as an eight course mattress and was a new thing to me entirely.

.

Q.—Now Captain, to go back to the description of that brush that was on this barge, you say that the brush was in two tiers, as I understand it?

A.—Yes, sir.

Q.—The lower tier being 50 by 100 feet in its horizontal dimensions?

A.—Yes, sir.

Q.—Then that lower tier before it decreased in dimensions, was about how high?

A.—About four feet; a little less.

Q.—Now, that first tier which is about four feet high you say, was divided into parts by little poles sticking out; the ends of them sticking out?

A.—Yes, sir; that was divided into four courses.

Q.—Then at the top of that fourth course there was a decrease in the dimensions of the next tier?

A.—Yes, sir; 10 feet at each end, making that one about 50 by 80 feet. The design of that is that in going into the jetty the mattress goes with its short dimension on the axis of the jetty, so that when those are laid in the work, each advances the jetty 50 feet, with a width of 100 feet for four courses, and a width of 80 feet for the next four courses. It is possible that that 80 feet was 90 feet. I think it was 80 however.

Q.—Now, this second tier after getting up the first tier four feet, the second tier you say was about 50 by 80 or 90 feet?

A.—It was 50 by 80. I am positive of it; about that.

Q.—How was that divided; in courses also?

A.—Also divided into four courses in the same manner as the lower tier.

Q.—So that there were eight courses in that entire brush?

A.—Yes, sir.

Q.—Counting from the bottom?

A.—Counting from the bottom to the top.

Q.—And the entire course from the bottom to the top was seven feet nine inches?

A.—Seven and nine-tenths feet on the average.

Q.—You stated that on top of the mattress there was a grillage of poles?

A.—Yes, sir.

Q.—What do you mean by grillage of poles?

A.—I mean a set of poles running in one direction of the mattress and another set crossing them at right angles. In this case they were spaced about 8 feet apart each way, and then bound together with wires; the poles running in each direction.

Q.—Well, just wait a moment; let's get the grillage first. Look at this drawing which has the old court martial Exhibit No. 5. Does that photograph show the top of that brush?

A.—Yes, sir.

Q.—Does it show the grillage of poles?

A.—Yes, sir.

Q.—Now, those poles crossing each other on the top of that mattress make what you call a grillage of poles?

A.—Yes, sir.

Q.—Then at the top of that lower tier—the fourth tier—is there another grillage of poles?

A.—Yes, sir; as far as I could see. It is impossible to tell whether underneath the top half of the mattress, whether the poles running the short way of the mattress were used or not; I don't remember. I might have found them at the ends, but I cannot recall for certain.

Q.—Now, between the top of the lower tier and the top of the upper tier were there dividing poles that marked off those four layers of courses of mats; were they crossed or not?

A.—They were not between the separating poles between each lower one constituting one-half of the grillage. It has poles 8 feet apart running one way only. The next the separating poles between the next two layers would be the same, but running in the opposite direction, their direction being at right angles.

Q.—Now, looking at this photograph with the old Exhibit No. 5 on it, looking at this grillage of poles which you have described on the top of it, if you were to take off the top layer of poles, then that would leave a layer of poles running one way of that mattress?

A.—Yes, sir.

Q.—And that is what you call a half grillage?

A.—Yes, sir.

Q.—In these other four courses then below the top of the mattress, there were only half a grillage?

A.—Only half grillage.

Q.—That you could see?

A.—Yes, sir.

Q.—And in the lower tier below the top course of the lower tier, were there whole grillages or half grillages?

A.—There were half grillages. On the bottom of the whole mattress was a full grillage again.

Q.—Now, how were these grillages fastened?

A.—The separate poles of each line constituting a continuous pole across the mattress and wired together with a lap. The poles of each half of the grillage were wired at the crossings of the other half of the grillage, and the full top grillage was wired to the full bottom grillage by wires running through the mattress.

Q.—I call your attention, Captain, to contract No. 6,517, Atlantic Contracting Company, contract of October 8th 1896, for Cumberland Sound, marked Exhibit 86. Look at the first design of mattress in that contract; that is the raft of round logs not less than 12 inches, and so on, with brush etc. Does that mattress or any part of it correspond for a mattress with the description in the first design in that contract?

A.—It does not.

Q.—Look at the second design in that contract No. 6,517, and state whether the mattress which you inspected at that time, which was to be put in by the contractor under that contract, corresponded to the second design?

A.—It did not.

Q.—Look at the third design specified in that contract and state whether the mattress which you saw being put in at that time corresponded with the third design?

A.—It did not.

Q.—Did it come anywhere near to any of these three designs, and if so which of the designs did it come the nearest to?

A.—The third design.

Q.—Now Captain, I will take up the language of the third design in that specification to the contract, Cumberland Sound No. 6,517 of October 8th 1896. I will first ask you in reference to each course of mattress, considering that there are eight courses in that lot of brush that was on that barge. Take the first course?

Mr. Rose:—From which side, top or bottom?

Mr. Erwin:—Well, we will take it from the bottom.

Q.—(Continued). And I will ask you now to state whether the first course corresponded to this description of the design: "This mattress will consist of a bottom grillage of poles of live saplings of pine or other timber of a kind approved by the engineer officer in charge". Did that bottom course have a bottom grillage of poles ?

A.—It did.

Q.—Take the next feature of the description of poles: "The poles must be straight, of slight taper and of an average diameter of from four to five inches and not less than three inches at the small end, and must be placed from four to eight feet apart between the centres."

Mr. Rose:—May I ash one question before answering that ?

Q.—(By Mr. Rose.).—Captain, did you go under the mat ?

A.—Yes sir.

Q.—Yourself ?

A.—Personally.

Q.—Under it ?

A.—Under it, yes sir.

Q.—You did not state that before, and that is the reason I ask it?

A.—Yes, I stated that I verified the soundings from the lower end when it reached the bottom.

Q.—Somebody else did ?

A.—I stated I checked some of them. I was on top and checked the reading, and I went underneath and took some of the soundings. I could not be in both places at the same time. I may not have stated so; I did, however.

Q.—(By Mr. Erwin). Answer that question, Captain ?

A.—The poles used in the bottom grillage did not correspond with the specifications. They were very much smaller in diameter; they did not average from four to five inches, and there was none of them as large as three inches at the small end. They were placed just within that specification.

It says from 4 to 8 feet. They were placed fully 8 feet or a trifle more if anything from centre to centre.

Q.—Additional language of the specification in regard to the poles that they "must be placed 4 to 8 feet apart between centres, both longitudinally and transversely and spliced together with long scarfed joints in a manner satisfactory to the engineer officer in charge?"

A.—They were not so spliced; they were simply lapped and wired.

Q.—Now, this additional feature: "Upon this grillage will be placed a layer of closely compacted fascines surmounted by a top grillage similar in design to the one at the bottom". Now first in regard to the layer of closely compacted fascines?

A.—They were not there.

Q.—Well now, describe what was there that in any way conformed to a fascine?

A.—A layer of very loose brush which was possibly loosely bound into bundles and tied with lath yarn. I remember seeing a few ties of lath yarn which you had to hunt to find. While I only found a few of them, I believe all the brush was so bundled.

Q.—Well, what made the brush bundle lose its identity there, Captain?

A.—It was so loose that it spread out and it does not correspond to the specifications in that they were not closely compacted and they were not closely compacted fascines. They could be described as loosely tied, or loosely compacted bundles.

Q.—Now the latter part of that description which I read; that is to say "surmounted by a top grillage similar in design to the one at the bottom"?

A.—It was not so surmounted. There was only a half grillage there.

Q.—That is only one?

A.—Poles running one way across the mattress 8 feet apart. No poles at right angles to them. There was no such grillage on top of the lower course.

Q.—Look at the further description in these specificaitons in regard to that third design of mattress. "The poles of each grillage will be securely fastened together by suitable wire or rope lashings, and the upper and lower grillages will also be securely fastened together in such maner as the engineer officer in charge may approve?"

A.—The poles of the lower grillage were wired together. The poles of the upper grillage could of course not be wired together as there was only a half grillage there, and I could find no fastening connections that top half with the lower full grillage disregarding all of the mattress except the lower course as you specified.

Q.—Now take the next course of the mattress on top of the course which you just described?

A.—It would be described as precisely—as the same as the other, with the exception that taking the half grillage on top of the lower course as applying to the lower course, there was no grillage at all for the bottom of the second course; only a half grillage on top of the second course. These poles were deficient and the bundles were not fascines and were no better than those in the bottom course as far as could be seen. Whether they were wired together or not of course I do not know. They were not wired at the outside. They might have been inside.

Q.—Then Captain Gillette if these two courses had been mattresses constructed strictly according to those specifications, and the one mattress laid on top of the other, there would have been between the lower course of mattress and the next course, two complete grillages, wouldn't there?

A.—Yes, sir.

Q.—That would have made four courses of poles?

A.—And four half grillages.

Q.—Four half grillages of poles. That is, at the top of the lower course there would be a complete grillage belonging to that course, and then there would be the bottom grillage of the other matress?

A.—Yes, belonging to it.

Q.—But in point of fact there was only a half grillage?

A.—For both of them.

Q.—For both of them between the two mattresses?

A.—Yes, sir.

Q.—Now, did that same construction—does that same description of construction apply throughout that entire eight courses of brush on the barge, with the exception that there was a full grillage on the first—on the top of the fourth tier, and a full grillage at the top of the complete brush?

A.—It does. There was a full grillage on top of the whole mattress; there was a half grillage between the two sections of the mattress of different lengths but possibly a full grillage; a full grillage only showed at the ends. To the best of my memory, however, those cross-poles did not go through, so that between the two tiers, as you call them, of the mattress there was really only a half grillage, excepting at each end one extra pole was laid across.

Q.—Then by putting in the eight courses of mattress at one time, if the Government was paying for each of those courses as a complete mattress, was it getting the full amount of poles specified in this third design?

A.—It was not; it was only getting a fraction over one-third the proper amount, in this particular case; less than one-third; a fraction less than one-third.

Q.—You say you tried to walk across the mattress?

A.—Yes, I tried to walk across it.

Q.—Was that just in one place of the mattress it could not be done?

A.—I went all over it; it was the same everywhere. If you wanted to go across it with any degree of speed or comfort you had to walk a pole or grillage of poles. Almost anywhere you stepped you were liable to go in two feet or the whole length of your leg. I went in the length of my legs at least half a dozen times. Possibly, by carefully picking the place you were going to step each time on the

larger piece of brush you could get across otherwise, but in crossing the mattress I walked the pole every time.

Q.—Did you make any other investigation to find out whether the same work was—I mean the work was being put in under these contracts at Savannah and Brunswick in the same way?

A.—Yes, sir.

Q.—Did your discovery in regard to that lead to the investigation which was afterwards made?

A.—Yes, sir.

Q.—Captain Gillette, did you have a mattress made at that time, or shortly thereafter, to conform to the specifications in that contract?

Mr. Rose: As he understood them or interpreted them?

Mr. Erwin: Yes, as you understood it.

A.—I had a mattress made at that time, as the inspectors understood the interpretation. I gave orders to have a mattress made which should consist of four mattresses of the specifications third design, piled one on top of the other. I gave no instructions whatever as to how to make those mattresses.

Q.(*By Mr. Rose*)—Was that order in writing?

A.—No, sir; verbal. I gave no instructions whatever except to make the mattress according to the specifications. As I recall it, I did not even discuss the details of the specifications with the assistant engineer to whom I gave the order. Certainly he had no copy of the specifications there. As I remember it, I sent him a copy. Possibly I may have repeated the order in writing; I won't be positive. I am positive however, I gave him no detailed instructions. In obedience to that order, a mattress was made which I inspected. At the same time there had been kept in the Bay near the office, the first mattress that came from the contractor's work, built without instructions, or the second one. Two came out the same day. One of them was allowed to go in the work; the other was retained. When the composite mattress, consisting of four mattresses on top of each

other, and on top of the barge, was ready, I went again to Fernandina and inspected the two mattresses. The one built by the contractors without instructions from me was like the one I first inspected, excepting it was a great deal better. There was a great deal more brush in it. I could walk across it with reasonable comfort. The bundles were made with more brush in them and they were jammed up together alongside each other with some degree of force. The whole thing was a much better mattress. The mattress which I had ordered made was made according to my ideas of the specifications, with one exception. The bundles were tight, full of brush in good shape, had some strength and system to them, but the brush was not trimmed. The bundles had been trimmed so that to the casual glance outside my ideas had been complied with. My ideas of the specifications were that the brush should be trimmed. The inspector in carrying those out had made a good substantial fascine of untrimmed brush, and then trimmed the fascine; trimmed all the brush that was sticking out. With that exception the mattress was made—and one more exception—made according to my ideas of the specifications, excepting that I did not require, or with the exception that the contractor had not made the lashing or splicing of the grillage poles with a scarfed joint. The poles were of the proper size and were lashed together. These mattresses were then, at my direction, weighed by the assistant engineer and measured, which measurement was verified by myself. Reduced to square yards the square yards of the contractor's mattress —or it took 227 square yards of the contractor's mattress to weigh. — — —

Q.—Who was the man that weighed it?

A.—Marion Twiggs, assistant engineer.

Q.—In your presence?

A.—No; he weighed it by displacement and made me an official report on the subject.

Q.—Is he living?

A.—No, he is dead.

Q.—Did the contractor put in the mattress which was on the barge, the one you first inspected, and the photographs of which are here?

A.—Yes, sir; that mattress went into the work.

Q.—Well, explain how it was put in?

A.—They towed it out to the position, had two tugs and a couple of lighters of stone as anchors and they got the barge upon which it was located at the right place, and they dropped it, as they call it; knocked out supports from one side of the mattress so that the mattress and the work on which it was located tipped to a sharp angle, and the mattress with some inducement slid off into the water; was aligned by means of poles fastened to it, and sunk by throwing rock into it and upon it. The first rock that was thrown was a rock two or three times the size of a man's head, and it dived right into the mattress out of sight completely. After they had piled up a number in that way, they began to show above the surface of the mattress, and the mattress gradually sank out of sight. It had very little buoyancy when first put in the water. Only a small portion of it appeared above the water, and as it sunk an appreciable percentage of the mattress floated off as leaves.

Q.—(By Mr. Rose). Green leaves?

A.—It was green when put in the mattress, but getting dry.

Q.—How long had it been cut?

A.—I don't suppose over two or three days. It was green brush, but the leaves had become sufficiently dry so that when it went into the water, the water was a bed of leaves almost. I was astonished to see so many come."

In the 1896 contract on Cumberland Sound, Captain Gillette says that the mattresses were not even according to the specifications 3rd design. Besides, the fascines making up these mattresses did not appear to be properly choked, and did not in several particulars comply to the requirements of the specifications. They were not tied at intervals of two feet as required, they were not tightly compressed as they ought to be; the brush was not straight and not trimmed, no

limbs trimmed off, and were not of the proper length.

To make them of the length required by the specifications would have required a great deal more time and care, and the mattresses would have had to be built near the shore, either on ways on the shore or ways on a lighter moored along the shore, and not in the brush camps. The first mattress that Captain Gillette inspected did not contain one-third of the material that went into the making of a mattress ordered by him to be made according to the specifications of contract No. 6517, 1896.

In the first design of mattress of contract 6517, October 8th, 1896, with the Atlantic Contracting Company, for Cumberland Sound, there is enormously more material than there was in any layer of that first mattress he inspected, leaving out the logs entirely, which alone he estimates at forty cents per square yard, and which were wanting, and he estimates that the cost of putting in a square yard of log mattress of the first design to be five times more than what he saw go in.

COOPER'S DEPOSITION.

Arthur S. Cooper was Assistant Engineer under Carter in 1892 and 1896, and had supervision of the entire work under contract of October 8th, 1896, with The Atlantic Contracting Company for Savannah Harbour. This witness says that he saw nine-tenths of the mattresses going into the work under the 1892 and 1896 contracts; that they were made of several courses put one on top of the other, making one multiple mat and sunk altogether; that there were no Government inspectors in the brush camps; that Carter knew of the manner in which the mattresses were built, and stated that he was satisfied with it; that he was asked once by Carter to give false certificates as to the apparent number of courses in multiple mats; that he only had the opportunity to examine the mattresses from the outside, as they were brought from the brush camps ready to be sunk.

On March 10th, 1897, Mr. Cooper wrote to Captain Carter calling his attention to the fact that there was not sufficient stone on a certain breakwater at Savannah and recommended

an additional stone covering to keep the worms (Toredo) from destroying it, and keep the mats from being washed away. Carter paid no attention to the recommendation.

The following is a résumé of the deposition of Cooper:

He testifies that when the work under the 1892 contract was commenced, the mats were put in singly, and each mat towed to position and sunk by itself, but later on, the contractors used three courses at a time, sunk off the end of a gin barge making continuous mats. That kind of work was commenced in 1893 by the contractors, and is known as the multiple mats, that is, the entire height of the dam was built on barges and sunk in place at one time, one launching—these mats averaged about seven courses. Logs were placed on a gin barge in such a manner that the mats could be dumped off into the water and sunk into the required position. There was usually a row of piles driven, and the barge brought up to the piles and the gins tipped so that the mattress would slide off into the water against the piles, and then the mattress was loaded with stone as it went to the bottom.

Cooper states that under the 1892 and 1896 contracts for Savannah Harbour there was as a rule no inspectors in the mat camps. There had been some instances where inspectors were placed in charge of the mat camps, and kept there for a month or possibly two months, and then they would be taken away again, but there was no regular inspector at the mat camps. This is true of both contracts of 1892 and 1896, except that in the 1896 contracts there was no inspector at all in the mat camps.

Cooper never saw the mats until they were brought to the river camps for placing in the work. They were brought there complete, ready for use, and he had no opportunity of seeing them except from the outside. It was impossible to tell exactly what the interior was composed of. In some instances he examined, and had an opportunity of examining, the inside of them. In one case particularly one of the inspectors called his attention to a hollow space in the mat, and when he examined it, he found he could see daylight

through the mat, which was supposed to be ten feet thick—a seven course mat. He went into the mat, in fact went down through the mat clear to the deck. The open space was as large as an ordinary office desk, and right in the centre. He reported this fact to Captain Carter, who said that he would put an inspector, but he did not put any.

Carter had opportunities to see what was going on. He called Cooper's attention to the mode of construction when Cooper took charge of the work in 1893, and told him he wanted the work constructed in that manner, that is, in the manner he found it being constructed in 1893, and Cooper carried on the work just as directed by Carter, and just as he found it going on. Whenever the work seemed deteriorating or slackening, Cooper called Carter's attention to it, and also reported it to the contractor.

Cooper states that in the actual construction of the multiple mat under the 1892 contract, instead of constructing each mattress with the full complement of poles required for each mattress under the specifications, that is, giving two complete grillages of poles between each mattress that there was not in fact put in even one full grillage of poles, but only a half grillage, that is, the fascines of the respective mattresses were only separated by a layer of poles eight feet apart running one way. This method of construction was used in the 1896 contract.

Cooper states that Carter in his instructions told him to report in certain circumstances a certain number of courses in the mat whether they were there or not, which he declined to do.

The following is the letter of Cooper of date 10th March, 1897, already referred to.

Tybee Island, Ga.,
March 10th, 1897.

Capt. O. M. Carter,
Corps of Eng's U.S.A.,
Savannah, Ga.

Sir:—

I have the honor to report that I have this day made a careful examination of the Breakwater. There is no doubt

of the fact that the mats that have been sunk have not sanded up in the least. At places where I was able to shove a pole through the mats the hard sand bottom was exactly the same depth as it was 100 feet outside of the dam; and also at the edges of the mat there has been no piling up of the sand as would naturally be expected. In fact at some places there is actually a scour. It is therefore evident that no sanding will take place, or at least not until the crest is brought up much higher, probably high enough to stop the ebb flow entirely at low water. I would recommend that the present mat work be either stopped or slackened up and what is already laid be covered over with sufficient rocks to prevent the worms from destroying it.

This should be done also on account of the danger of loosing the mats already placed by the action of severe storms. There are two places that have already been considerably damaged, say for about 100 feet in length of the wall. I would further recommend that no mats be left with less than about 300 cubic yards of stone on them; and would give it as my opinion that about 150 to 200 cubic yards for each 100 feet in length should be put on the old work as soon as possible.

Very Respectfully,
Your obd't serv't,

A. S. COOPER,
Asst. Eng'r.

Cooper testifies that in 1893 one W. G. Austin was employed by Carter for some time as inspector upon the recommendation of Benjamin D. Greene, one of the accused.

Captain Gillette not being satisfied with the manner in which the work was being carried on under the 1896 contracts reported the matter to his chief officer, and an investigation was ordered to be made by a Board of Enquiry. Some papers and documents left by Carter in a file case in his late office at Savannah, were then detained, and by the

stubs of the cheque books and receipts found therein, his personal expenses and disbursements for the year 1896 were traced to the enormous sum of $28,611.67.

It is proven that before 1891 Captain Carter was poor, and had been frequently borrowing money from the accused Benjamin D. Greene. Moreover it was discovered that Captain Carter had become a great capitalist, having acquired from January, 1893, to May 12th, 1896, $561,471.50 worth of securities. This great wealth was acquired while Carter was so employed as local engineer by the United States for the District of Savannah while a great number of contracts had been let out by him to the accused at very high prices, and is unexplained.

Mr. R. F. Wescott, his father-in-law, a rich man, testifies that he never gave anything worth mentioning to his daughter, beyond the furniture of a house, and a couple of thousand dollars.

It is shown by the books of J. L. Gallagher, bookkeeper of The Atlantic Contracting Company, and the examination of the accounts of the Atlantic Contracting Company in the local banks of Savannah that the cost to the contractors of the total work under the contracts of 1896 was for Savannah $97,812.99 and for Cumberland Sound $108,150.31. For Savannah Harbour they received on the sixth of July, 1897, $230,749.90 and for the work done in August, 1897, $31,-159.40, making in all $261,909.30, and it is in evidence that the contractors are still claiming under this contract $350,000.

For Cumberland Sound they received on the said 6th of July, 1897, $435,000 and they are still claiming $600,739.02.

It is proven that the introduction of three designs of mattress, two of superior quality and value, and a third of very inferior value, in the specifications for work to be let out in the district of Savannah, the three to be within the selection of the engineer in charge, and to be tendered for at one price for the three designs, was an innovation of Carter's. The very high prices at which the contracts of 1896 were made

out are striking when compared with similar work on the contracts before 1892. Exhibit 193 shows that the prices for brush mattress, third design was 94 cents per cubic yard in 1885; $1.40 in 1890 for mattresses of better quality; were $3.49 in 1891, $3.80 and $4.20 in 1892, and $3.80 and $4.40 in 1896 for mattresses third design, that is to say a very inferior quality in comparison with the others.

Under the 1896 contracts the mattresses were built under a system called multiple mats as has been stated by Gillette and Cooper, that is, a number of mats were constructed on a barge, one on top of the other, making a pile sometimes of six or eight or more mats, a multiple mat the entire height of the dam being built, on the barge, and sunk in place at one launching. The reading of these specifications in the 1896 contracts in reference to mattresses does not convince one that this system of construction was the one apparently contemplated.

The following is an extract from section 37 of contract 6515 of October 8th, 1896, for Savannah:

"No mattress will be accepted until properly placed in the work and secured there by a layer of stone of such thickness as may be required by the Engineer Officer in charge. Gaps between the edges of adjacent sections of mattress will be filled with stone by the contractor, to be paid for at a price equal to the price of mattress work. Portions of the mattress lying more than four feet outside of the position assigned will not be accepted or paid for. Separate bids for the designs for mattresses are not desired. One price only should be given in the proposals and the price so stated will be understood as referring to any of the designs which may be required by the engineer officer in charge."

The latter part of section 38 in contract 6,517 of October 8th, 1896, for Cumberland Sound is in exactly similar terms.

These specifications refer to one mattress only, and not to a course of several mattresses, and provide for proper grillages of poles in each mattress, and of a layer of stone on

each mattress, and the witnesses Cooper and Gillette say that the multiple mats were deficient in poles and brush, and naturally did not have on each of them a proper layer of stone, for the whole construction was sunk at a time, that is to say, allowed to slide from a gin barge and when in position, loaded with stone until it sank.

The fascines also for these mattresses were not of the proper length, and were brought from the brush camps ready made, which would not have been possible if they had been of the proper length, says Gillette, for then they would have had to be hauled to the place where the mattress was being constructed, and re-made properly.

A similar construction and system were in force at Savannah says Cooper.

Moreover, it was impossible to examine the internal construction of these multiple mats. Any layman will easily see the immense saving to the contractors in timber, stone and labour such a construction afforded, and also the time spared in the sinking of an eight course mattress instead of sinking each mattress separately.

One understands at once the large opening for fraud adduced by the construction of these multiple mats, and the manner in which it affected the work as far as solidity, durability, and value to the United States are concerned.

Captain Gillette saw the work at Cumberland Sound only after the 6th of July 1897. It was then carried on in the same manner as at Savannah Harbour and the presumption is that it was so before he saw it, because the contractors were the same, the nature of the work was the same, and the manager of the work at Cumberland Sound, William T. Gaynor, had been managing the work for some time at Savannah Harbour with Edward H. Gaynor.

The manner in which these contracts were let out to the contractors was looked into by the United States authorities, and the circumstances accompanying the transaction were enquired into. It was found that the accused had succeeded in suppressing competition in reference to the 1896 contracts. This is proven by the deposition of W. H. Venable. This

gentleman, a contractor and owner of quarries, testified that he intended to bid on these contracts for Savannah Harbour, and Cumberland Sound. He went to Savannah for this purpose, and whilst there he was met by accused Gaynor, who offered to take from him all the stone required for the construction of the work advertised for if he would not bid himself for it, in case The Atlantic Contracting Company got the contracts, which proposed arrangement was subscribed to by Gaynor, Greene and himself. Mr. Venable affirms that Gaynor asked him to deliver to him the three copies of specifications that he had obtained from Carter with great difficulty, as is shown by the correspondence exchanged between Barrows & sborne, Attorneys, and Carter. Gaynor said that he had collected all the other copies of specifications sent out.

The contracts were made out to The Atlantic Contracting Company at the high prices that we know. The stone to be used under these contracts of 1896 was estimated at 350,000 tons and a very good price was promised to be paid to Mr. Venable for it, but instead of having to furnish such a large quantity he was only required by the contractors to furnish a very small quantity, to the value of only $1,000 as no more was used by the contractors, brush being substituted for the stone.

Mr. Venable says in his deposition that when he went to Carter's office, he was introduced into his private office, and that he was asked by Carter if he intended to bid, and having answered in the affirmative Carter told him that no money had been voted yet by Congress for the work, and that the contractors would have to advance the money themselves for the construction, that to undertake this work it required an equipment of at least $400,000, that a large tramway would have to be built out in the sea at Cumberland Sound by the contractors to dump the stone, which would cost many thousands of dollars. He could not learn from Carter which design of mattress would be called for. Now, the equipment of The Atlantic Contracting Company for this work was valued at $26,932.50, and no trestle had to be built by the

contractors, and the whole cost of equipment and work at Savannah and Cumberland Sound did not exceed $200,000 as has already been seen in the deposition of Gallagher. When Mr. Venable had completed his arrangement for furnishing the stone to be required for the work B. D. Greene showed him a bid which he had prepared ,which was $200,-000 lower than the bid filed and on which the contracts were let out.

The specifications for contracts of October 8th 1896, Cumberland Sound only, number 6,517, assumed that 200,000 cubic yards of mattress work, 50,000 tons of first class stone, 425,000 cubic yards of stone of other classes would be required for the work under this contract..... By reason of a change said by Captain Greene to Mr. Venable to have been made, instead of 200,000 square yards of mattress assumed in the specification to be required for this work 446,102 square yards of mattress, third design (the worst for the government, and the most profitable for the contractors, especially when it is considered that even the specifications as to this were far from being complied with) were used.

Another thing to be considered in reference to the letting out of these 1896 contracts is the shortness of the advertisement given to the public and intending bidders, for becoming acquainted with the fact that contracts for the proposed work were to be let out, and consequently for the preparation of bids. The advertisements for these 1896 contracts which were one million dollar contract for Savannah Harbour and a two million dollar contract for Cumberland Sound, were only printed for 23 days in the local papers, and 19 days in the engineering papers. The regulations were to publish advertisements of the letting out of large contracts for at least thirty days. A noticeable fact in connection with the advertisement for these two contracts is, that although they were really published on August 17th, 1896, calling for bids to be opened on September 8th 1896, by special orders from Carter, they bore the date June 6th 1896. This is the date they were originally prepared by

him for approval at Washington. The reason for this particular deceit is not known.

Under ordinary circumstances some of the facts immediately recited would be of small importance, but when such fraud has been perpetrated they are liable to become links in the chain leading to proof of criminality.

A transaction of great significance in this case is the delivery, in the early part of September, 1897, by Carter, of all his securities to Greene and Gaynor, and the returning of them by Greene to Mr. R. F. Westcott, and by Westcott to Carter on October 29th, 1897. Carter had left for England to fill his new position in the latter part of July 1897, but had suddenly come back in the beginning of September. Mr. Westcott says that Carter told him then that he expected to be arrested, that he had taken all his securities to Greene and Gaynor at the Hoffman House, that he felt he had made a mistake in doing so, and wanted Westcott to take charge of them, which finally Westcott consented to do. Carter told him that Greene and Gaynor would bring the securities to Westcott the next day at ten o'clock. They did not bring them at that time, and on telephoning to them, Gaynor replied to Westcott that they had changed their minds and were not going to bring the bonds. The next day however, Greene brought the bonds to Westcott's house, Westcott took Greene to the safety Deposit Company, where they were deposited in Westcott's box. Afterwards, about the 11th October 1897, on Greene asking him, he (Westcott) turned over some of the bonds to Carter and on the 29th October 1897 he turned over the balance to him (Carter) and took a receipt which is in this form:

Received, New York, October 29th, 1897, from R. F. Westcott, the following instruments:

5 Ches. & Ohio, 5s. 21025, 21026, 21027, 21028, 21029. Last Coupon, Nov. 1897.

15 Del. & Hud. 7s. 1649, 1648, 841, 528, 293, 122, 842, 840, 593, 125, 124, 123, 121, 83, 82. Last Coupon, Sept., 1897.

10 Chic., St. P., Minn., & Om., 6s. 21117, 21118, 21123, 21116, 20242, 19282, 16672, 16102, 15926, 2093. Last Coupon, Dec., '97.

15 Chi. & N. W., 7s. 13216, 13213, 13212, 13211, 13209, 13210, 13208, 13207, 13206, 13205, 7527, 7526, 7525, 7524, 7523. Last Coupon, Nov., 1897.

30 United N. J., 4s. 8650, 8651, 8652, 8653, 8654, 8655, 8656, 8657, 8658, 8659. Last Coupon, Sept., 1897. 17312, 17313, 17314, 17315, 17316, 17396, 17397, 17398, 17399, 17400, 18442, 18443, 18444, 18445, 19179, 19186, 19397, 19398, 19399, 19400. Last Coupon, Sept., 1897.

10 Mil. Lake Sh. & West, 6s. 697, 698, 699, 845, 844, 843, 847, 846, 848, 839. Last Coupon, Nov., 1897.

50 Long Dock, 6s. 2601, 2602. 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2689, 2690, 2691, 2692, 2693, 2695, 2696, 2697, 2698, 2699, 2700, 3611 3610, 3609, 3608, 3607, 3606, 3605, 3604, 3603, 3602, 2202, 2201, 803, 802, 183, 182, 181, 180, 2837, 2836, 2694. Last Coupon, Oct., 1897.

30 N. Y. Lack. & West., 6s. 11350, 11349, 11348, 11347, 11346, 11315, 11314, 11313, 11312, 11311, 11310, 11309, 11308, 11307, 11306, 11305, 11304, 11303, 11302, 11301, 9500, 9499, 9498, 9497, 9496, 9495, 9494, 8537, 8536, 8535. Last Coupon, Jan., 1898, (O. M. C.).

5 N. J. Junc., 4s. 940, 941, 1256, 1258, 1489. Last Coupon, Feb., 1898.

20 N. Y. Lack. & West. 5s. 1036, 1037, 1044, 1045, 1038, 1171, 1172, 1039, 1173, 1174, 1040, 1175, 1176, 1041, 1177, 1042, 1178, 1179, 1043, 1180. Last Coupon, Feb., 1898.

10 Morris & Essex, 7s. 8114, 8113, 8112, 8111, 8110, 8109, 2983, 1495, 9308, 9307. Last Coupon, Dec., 1897.

3 Morris & Essex, 4½s. 848, 1120, 1121. Last Coupon, Jan., 1898.

5 Wabash, D. & C., 5s. 1739, 1621, 1736, 1731, 1738. Last Coupon, July, 1897.

10 Chi., Mil. & St. P., 7s. 5447, 5446, 5445, 5444, 6318, 5440 525, 5441, 5442, 5443. Last Coupon, Jan., 1898. "

4 U. S., 5s. 17461, 17458, 17456, 17453. Last Coupon, Nov., 1897.

2 Certificates for 100 shares each in capital stock of Del. & Hud. Canal Co., Nos. 25868, 25869, in my name.

2 Receivers Certificates B. & O. R.R. Co., for $5,000.00 each, Nos. 791 and 792, Coupons Dec. 1, 1897, attached.

7 Promissory Notes of T. M. Cunningham to Robert F. Westcott, for $275.00 each, dated June 29, 1895. Endorsed "without recourse," by Robt. F. Westcott.

Deed to secure foregoing notes and others by T. M. Cunningham to Robert F. Westcott, dated June 29th, 1895.

1 Promissory note of Beirne Gordon to R. F. Westcott for $10,000.00 and

9 Promissory notes of same to same for $300.00 each, all of said notes being dated Nov. 4th, 1896, and endorsed "without recourse," by R. F. Westcott.

Deed Beirne Gordon to R. P. Westcott, dated Nov. 4th, 1896, to secure foregoing notes and others.

1 Promissory note of John Lyons to Robert F. Westcott for $15,000.00 with covenant of Insurance, etc., annexed, dated June 29th, 1895. (O. M. C.)

1 Promissory note by John Lyons to Robert F. Westcott for $15,000.00, dated June 29th, 1895, and endorsed "without recourse" by the payee.

1 Promissory note of same to same, of same date, similarly endorsed, for $450.00.

1 Promissory note of same to same, of same date, similarly endorsed, for $450.00.

Deed to secure foregoing notes and others, by John Lyons to Robert F. Westcott, dated June 29th, 1895.

1 Certificate of Insurance, dated June 29th, 1895, executed by Dearing & Hull, agents.

Deed, J. W. Howie and J. F. Bragg, as executors to R. F. Westcott, dated Nov. 27th, 1894.

Policy of Insurance to Robert F. Westcott of title to property conveyed in foregoing deed.

Bond and Mortgage, Thomas Martin to O. M. Carter, dated Nov. 8th, 1895.

Receipt, A. Minis to O. M. Carter, dated Nov. 11th, 1896.

Receipt, Thomas Martin to A. Minis, atty., dated Nov. 21st, 1895.

OBERLIN M. CARTER.

Endorsed on back: ,

—RECEIPT—

When Greene so delivered Carter's securities to Westcott, he made to him the surprising statement that these securities were his, Westcott's, as he was their (Greene and Gaynor's) partner in these 1896 contracts, which fact Westcott energetically denied. Those securities brought to Westcott by Greene and turned over to Carter by Westcott, at cost price, including the securities and property already in Carter's possession, represented a value of $570,801.85. The prosecution claim that the real partner to Gaynor and Greene was Carter himself.

As the Government funds for these contracts of 1896 were only to be available on July 1st, 1897, the contractors had to advance the money themselves for the purpose of carrying along the work. Mr. Johnson, an expert accountant and bank examiner, has established that during the progress of the 1896 work, the Gaynors had advanced $43,500, and Greene an amount of $89,350, made up by a $50,000 loan made to him by Carter's father-in-law, at the request

of Carter. Mr. Johnson has also established that the proceeds of the two cheques of $230,749.90 and of $345,000 were not evenly divided between Gaynor and Greene, Gaynor getting on the 6th of July, 1897, a share equivalent to one-third, the advances made by both being reimbursed, whilst two-thirds remained in the possession of Greene. He, on the 8th of July invested $172,000, apparently of this money, in the purchase of $150,000 United States bonds. The profits to be taken out of these two cheques divided in three, would, according to the witness Johnson, have made $126,691.67, which amount with the $50,000 loan by Westcott to Greene at Carter's request, would make $176,766,67, about the amount invested by Greene on July 8th, in United States bonds, of which he had on August 6th a portion sold for $22,700, when he repaid $21,000 to Westcott.

It is pointed out by the prosecution that the supposed fraudulent claims and vouchers upon which the two cheques of the 6th of July were paid to accused, were prepared for them by Carter's confidential clerk, M. A. Connolly, he signing the name of Edward H. Gaynor, Secretary of The Atlantic Contracting Company.

Before succeeding to General Gillmore whose headquarters were in New York, Captain Carter was Resident Engineer at Savannah since August 19th, 1884. The accused got their first contract in this engineering district of Savannah on September 1st, 1884. Since that time they were fortunate enough to capture all the contracts less one, for work let out in the district, amounting to 28 in number, of which the following is a correct list:

Savannah River and Harbour.
2744, September 1st, 1884, John F. Gaynor, Contractor.
3282, October 28th, 1886, John F. Gaynor, Contractor.
3890, January 16th, 1889, Wm. T. Gaynor, Contractor.
4224, November 5th, 1890, John F. Gaynor, Contractor.
4960, October 22nd, 1892, Atlantic Contracting Company, Contractor.

6515, October 8th, 1896, Savannah Harbour, Atlantic Contracting Company, Contractor.

Cumberland Sound.
2824, September 27, 1884, Lara and Ross, Contractors.
3285, October 29, 1886, Anson M. Bangs, Contractor.
3905, January 31, 1889, Anson M. Bangs, Contractor.
4572, May 4, 1891, John F. Gaynor, Contractor.
4820, September 16, 1892, Ed. H. Gaynor, Contractor.
5811, November 15, 1894, Anson M. Bangs, Contractor.
6517, October 8th, 1896, Atlantic Contracting Company.

Brunswick Harbour.
3307, October 30, 1886, Ed. H. Gaynor, Contractor.
4037, May 31, 1889, Charles C. Ely, Contractor.
(John F. Gaynor was manager of the work and Ely did not appear about the construction at all.)
4517, March 2, 1891, John F. Gaynor, Contractor.
5254, March 20, 1893, Atlantic Contracting Company.

Fort Clinch, Florida.
4637, July 20, 1891, Wm. H. Walsh, Contractor.
(Wm. H. Walsh was Greene and Gaynor's foreman.)

Darien Harbour and Mouth of Altamaha River.
5127, December 20, 1892, Atlantic Contracting Company, Contractor.
5133, December 20, 1892, Atlantic Contracting Company.
5253, March 1, 1893, Atlantic Contracting Company, Contractor.
6049, April 20, 1895, W. T. Gaynor, Contractor.

Altamaba River (Upper).
2933, December 5, 1884, Ed. H. Gaynor, Contractor.

Savannah River, Augusta.
2934, December 5, 1884, Ed. H. Gaynor, Contractor.
3392, February 9, 1887, John F. Gaynor, Contractor.

(W. H. Walsh was foreman of Greene and Gaynor's brush camp during the performance of this contract, and the money to pay off the hands under this contract was carried by Gallagher, the bookkeeper of the Atlantic Contracting Co., to Augusta.)

So they had many occasions to come into contact and a great intimacy appears to have sprung up between Gaynor and Greene, and Carter. Carter frequently before the year 1891 borrowed money from Greene, and they were mutually interested in private enterprises, as the following letters and extracts from letters will amply show.

On June 21st, 1885, Captain Carter writes to W. H. Brawley, Charleston:

"The enclosed letter was given to me by Captain Greene who will go to Washington, and he desires me to ask if you would be so kind as to have the copy referred to in your letter made, and sent to me. Please let me know the expense incurred, and I will remit the amount to you."

On November 2nd he writes to accused John F. Gaynor, concerning the purchase of Pine Lands in Georgia:

"It is not yet cold enough to go to work on our project. I am looking up pine lands, and whooping up the convention."

On June 24th, 1886, he writes to the accused B. D. Greene enclosing a cheque payable to Greene or order for $50.

On August 2nd, 1886, he sends accused Greene a cheque for $100 payable to his order, requesting him to credit it on his account, and on January 5th, 1888, he sends a cheque to accused B. D. Greene for $299.50 being a balance of an indebtedness of $1,600.

On May 24th, 1888, he writes to accused Greene in relation to proposed joint enterprise in a gas company, in an air jack, for cotton, and marble quarries, and says:

"There are only about five men in it and they are the best in Savannah. If it proves what we believe, with an investment of $10,000 the yield annually net ought to be $120,000, with larger yield by increase in plant. If it

amounts to anything of course I want you to go in with me, but say nothing to John as this is outside matter. I hear nothing further about the railroad."

On June 11th, 1888, Carter writes to Greene as follows:

"I expect to go to some quarries on the line of the S. F. & W. in about ten days, and they say they will put rock in at Savannah and Brunswick at whatever rates I say. Of course I have not seen the quarries yet, but if the rock is good it will be worth looking into and I want to know what you think good rock equal to New York stone would be worth delivered as stated."

"I have not seen Olmstead as he is at Rome."

On August 23rd, 1888, Carter again writes to accused Greene:

"I saw Olmstead about the marble and he says that he learns that a very badly shattered specimen was shipped to New York. There is a good specimen now at Rome. Please see if the sample in New York is suitable. If not, I will have the other piece shipped."

Another letter of Carter to accused Greene bears date September 1st, 1888, and contains the following:

"I leave for Rome to-night to secure lease for lands and begin work as required by lease. I rather think that only Olmstead, Hull and Lathrop will remain in, in which case they have already agreed to share equally with me. I have many things to talk to you about it. I have also got my eye on some coal lands near Birmingham..... Can you meet me in Washington?"

On September 23rd, 1888, Carter writes to accused Greene:

"I have nothing to invest just now as my money is like to take $1,250 or $2,500 worth of stock, 25 or 50 shares. Let me know if you wish to venture in it..... I had the block of marble shipped to Evans and wrote him to send it up to Batterson, See & Eisele. I sincerely hope the Chili scheme is not a paper one, only it looks too bright to last."

On October 25th, 1888, accused, B. D. Greene, writes to Carter as follows:

"Dear Carter:

Yours at hand, could not do dredging as cheap as you say and work only 4 months in two years The block of marble is at B., S. & E.'s, and has been for two weeks. Mr. See says he can do nothing with a block of such irregular quelity As John goes to Chili, Thursday, Nov. 1st, we can't very well handle the matter even if it were good, which I doubt. About six mo's from now $6,000,000 harbor work is coming up in Chili, and we have assurance of our ability to get it. We are now looking for a first class man to go with John as an expert. The first thing we shall tackle will be a tunnel 3,000 feet long, and we can have as many millions R.R. work proper as choose to take, probably we shall go for about $4,000,000 contract We have the preference, and John goes down on the ship with the general manager of the syndicate, so you see our show seems good. Now I want to do up Charleston, Savannah and Fernandina by July 1st next, so that we can go down by that time if not before. This I think is the chance of our lives. Now, let that dredging so John and I can sell out our stock, and hurry up the two works all you can so we can get going by New Year's. This is important.

"This Chili business is business, and I think within 90 days we shall be into that tunnel. What do you think of this? Of course the scheme I outlined when I first wrote you about Chili a month or more ago will be carried out, and a year hence will find us both struggling with the Spanish lingo Put that dredging through on the basis of working only a part of every other year, and no outside work, and you will see it is worth 18c. or 19c."

On November 22nd, 1888, Carter writes a letter to accused, Greene, in which he says:

"I told him that I wished you, Gaynor, Minis and himself with me in the Jack, but only you, Gaynor, himself

and myself in the cotton tieing business. Whatever the Chili business comes to, this appears to be certain, and if Clay can only do his share there is no doubt of great financial success."

On May 26th, 1889, Carter writes to accused, Greene, saying:

"Shall you be here within a week? If not, can you manage to let me have $2,000 if I should need it. I don't want that we should be frozen out of a good thing. I will write you again to-morrow night after I see Shepherd, and before going to Florida. Gaynor is not here, and I have not seen him in some days."

On June 6th, 1889, Carter telegraphs to B. D. Greene from Savannah to New York as follows:

"General Alexander desires me to ask you to telegraph the "Morning News" at once the following affidavit over your signature.

"The affidavit of Mr. Curtis, so far as it alleges an attempt upon my part to bribe him, and so far as it relates to statements said to have been made by me reflecting in any manner whatever upon Lieutenant Carter, is false in every particular. An affidavit to this effect will follow in due time."

The same day Carter sent the following telegram to accused, B. D. Greene:

"The affidavit of Curtis to which my telegram refers is as follows:

"In February B. D. Greene renewed the above proposition of Gaynor stating that he would add to my salary $500,00 per month and would get Lieut. Carter to increase said salary. He said it was in his power to secure my appointment and that he had also the power to have Lieut. Carter remove any obnoxious inspector, instancing Inspector G. W. Brown, who was removed at Fernandina in 1886, and stating that Brown's successor was worth to him $60 per day."

On the same day Carter writes to accused, Greene, on the same subject a letter in which he says:

"Don't fail to insert in the affidavit each and every statement that I have made."

On March 30th, 1891, Captain Carter writes to C. B. Bassett, Newark, in the following manner:

"Will you please inform me as to the character and amount of work proposed for Orange in regard to water supplies, sewerage and drainage. I should be glad to know also when proposals for the work are to be opened, if the work is to be done by contract?"

When in September, 1897, the papers of Captain Carter were detained in his file case, there was found among them a stock certificate book containing the certificates of stock issued, and later transfers of The Empire Construction Company. This stock certificate book shows 2,000 shares issued, of which there was issued June, 1891, to B. D. Greene, 1,980 shares; to J. F. Gaynor, 5 shares; E. H. Gaynor, 5 shares; to James E. Chandler, 5 shares; to A. M. Newton, 5 shares. It appears by the evidence of Mr. R. F. Westcott, father-in-law of Captain Carter, and who lived in Orange, that Carter was interested in this Empire Construction Company, with Gaynor and Greene, that the company got this Orange, New Jersey sewerage contract, and that Carter feared they would lose a lot of money on account of Greene not paying proper attention to the work. Mr. Westcott was then introduced to Greene by Carter.

On March 27th, 1891, Carter writes to E. V. Rossiter, an official of the New York Central Railroad as follows:

"Dear Sir:

When I presented your letter to Doctor Webb to-day he told me that he had virtually let the contract for the Herkimer Poland extension to Mr. Westbrook, a partner of General Husted, that the greater part of it had actually been

let, that work had been begun last Monday, and that he preferred to let the rest of the contract to the same party to whom he had already let the greater part. I regret exceedingly that I had no opportunity to submit a proposition for the work either as a whole or in part, as I feel confident that it would have inured to the company's benefit as well as to my own."

On April 6th he writes the following to Doctor Webb, President Wagner Palace Car Company:

"Dear Sir:—

Referring to our conversation of the 27th ultimo, I beg to state that if any extension of your Adirondack railroad to Tupper Lake or elsewhere is comtemplated, I should be glad to have an opportunity of submitting a proposition for the construction of the same. My associates and myself are in a position to begin work at once, to take a contract of any amount of work, and to carry the same forward to your entire satisfaction.

In his deposition Mr. R. F. Westcott, page 1101 stated that accused Greene had done that work.

MANNER OF PROVING CONSPIRACY.

Now, how is a conspiracy usually proven? Here is what is found on the subject in Arhbold's Criminal Practice and Pleading, page 1841, edition J. M. Pomeroys; note:

"A conspiracy is proved either expressly or by proof of facts from which the Jury may infer it. It is seldom proved expressly, nor can a case easily be imagined in which that is likely to occur unless where one of the persons implicated in the conspiracy consents to be examined as a witness for the prosecution. In nearly all cases therefore, the conspiracy is proved by circumstantial evidence, namely, by proof of facts from which the Jury may fairly imply it. It is usual to begin by showing that the defendants all knew each other, and that a certain degree of intimacy existed between them, so

as to show that their conspiring together is not improbable. If to this can be added evidence of any consultations, or private meetings between them, there is then a strong foundation for the evidence to be subsequently given, namely of the overt act of each of the defendants in furtherance of the common design".

And in East:—

"Conspiracy is generally a matter of inference from certain criminal acts of the parties accused done in pursuance of an apparent criminal purpose in common between them." R. vs Brissac 4 East 171.

And in Starkie: "Upon indictment for conspiracy the evidence is either direct of a meeting and consultation for the illegal purposes charged, or more usually from the very nature of the case, circumstantial." 2 Starkie on Evidence 232 (2nd edition).

And in re Murphy: "If on a charge of conspiring it appears that two persons by their acts are pursuing the same object, and often by the same means the one performing part of an act and the other completing it for the attainment of the act, the Jury may draw the conclusion that there is a conspiracy." Coleridge J., R. v. Murphy, C. & P. 297.

It seems to me that there is such an intimacy proven between Carter and the accused as to render a conspiracy between them, not only possible but probable. By becoming the associate of the accused in some collateral business whilst they were under contracts with the Government for work to be done under his (Carter's) control and supervision, Carter was treading upon dangerous ground, and if he was not actually serving two masters he was to a great extent imperilling the independence and impartiality so essential for him in the important and responsible office he occupied. The way he acted towards Mr. Venable at the time of the letting out of the 1896 contracts by chilling him is indicative of his desire of dissuading bidders from tendering for the work, which act was against the evident interest of the Government, to whose advantage it was to have the greatest competition

in the letting out of these contracts. The act of Carter in this circumstance, when seen in the light of what passed later on, is very suspicious. The accused succeeded in putting Venable out of the way, but the success of the operation was surely prepared by Carter, and this fact makes it wrong for all the participants in this transaction.

Next, the exorbitant prices at which the contracts were let out, the introduction of the three designs of mattress at the option of the engineer in charge, and to be tendered for at one price for the three; the calling for the cheapest design to the great detriment of his employers; the fraudulent manner in which the work was executed by the accused to the knowledge, and with the consent of Carter; his toleration of the construction of the multiple mats; his negligence to have inspectors in the brush camps, so that the material of these multiple mats could be examined; the fact that he had his father-in-law advance to Greene $50,000 whilst the work was carried on; his considerable and almost sudden wealth; his high living and annual expenses; his delivering over to Greene and Gaynor of all his securities when he thought himself in danger; the return of them to Westcott by Greene, with the declaration that they were his (Westcott's) property, which they knew to be false; the turning of them over by Westcott to Carter, who accepted them, with other minor facts such as the shortness of the delays in the advertisements of the letting of the contracts, and the fact that the accused could secure all the contracts adjudicated in the district, which might have been innocent in ordinary cases, are all in my opinion circumstances sufficient to justify one in believing that a corrupt agreement to defraud the United States had been in existence between Carter and the accused since at least there was any question of the letting out of the contracts of 1896, and was still in existence on the date mentioned in the information and complaint in this case.

With similar evidence to support a charge of conspiracy alleged to have been committed in this country, the accused, I believe, would be committed for trial.

Of course in the present case, I have not to commit upon the charge of conspiracy, because conspiracy *per se* is not an extraditable crime, but the conspiracy had to be proven to establish the overt acts charged as specific crimes, and to constitute participation by conspiracy in fraud by an agent and I think the allegation of conspiracy is proven beyond doubt.

But the prosecution has not stopped at adducing the evidence which I have above referred to. In order to establish more forcibly the criminal intent of Carter, and of the accused, they have meant to prove other fraudulent acts by them, in similar circumstances to those just enquired into, to show the criminality in the overt acts of the conspiracy presently charged as specific crimes. As justifying this course they have cited the case of The Queen vs Sternaman, in which it was held that:

1st.—Evidence is admissible on a charge of murder by poisoning, to show the administration of the same kind of poison by the prisoner to another person, as proving intent;

2nd.—Evidence of similar symptoms of arsenical poisoning attending the death of prisoner's former husband following administration to him of food prepared by the prisoner, is evidence to show intent as regards the charge of arsenical poisoning of a second husband on evidence of arsenical poisoning of the latter, and of similar preparation of food by the prisoner, and her attendance on her husband during his illness. (1 Canadian Criminal Cases, page 1), and the authorities there cited, and particularly the leading case of Makin vs The Attorney General of New South Wales, 1894, Law Reports, 1894, page 57, in which the following decision was given:

"Evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him. Where prisoners had been convicted of the wilful murder of an

infant child, which the evidence showed they had received from its mother on certain representations as to their willingness to adopt it, and upon a sum inadequate for its support for more than a very limited period, and whose body the evidence showed had been found buried in the garden of a house occupied by them.

Held: That evidence that several other infants had been received by the prisoners from their mothers, on like representations, and on like terms, and that bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners, was relevant to the issue which had been tried by the jury."

See also Connolly and McGreevy, 25 Ontario Reports, 168-169.

In re Hoke, 14 Revue Légale, 705, where it was held by Dugas, J.S.P.

" The guilty intent must have been precedent to and have accompanied the fabrication of such forged instruments, and the repetition of acts of the same kind, will be admitted in evidence as proof of such guilty intent."

The same has been decided in the U. S. See Wood vs U.S., 41, U.S. 16 Peters, page 342.

Taylor vs U.S., 44 U.S., 3 Howard 197.

Moore vs U.S., 150 U.S., 57, Book 37 Law Edition 996.

U.S. vs Snyder, 14 F. R. 554.

Queen vs Mulcahey, Law Rep., 3 H.L. 306, 317.

With these authorities in support, I think the evidence of other overt acts to show guilty intent must be admitted, and this other evidence may be briefly reviewed as follows:

We have seen before that out of 28 contracts for work let out in the district from 1884 to 1897, only one went to a gentleman not connected with the accused, and this man is Mr. A. J. Twiggs, a civil engineer and contractor of Augusta, Georgia. We have seen also the great changes in the price of mattresses since Carter's tenure of office the price increasing from 94 cents per cubic yard in 1885, and $1.40 in 1890 to $4.40 in 1896, for less costly and less valuable work to

the United States; also the new feature of the introduction in 1891 of three designs of mattress, to be bid for at one price, and to be selected by the engineer in charge which opened the door to the commission of the frauds complained of.

The narration now of the experience of Mr. Twiggs and of Mr. Agnew, and the coming in contact of Mr. Charles P. Goodyear, of Brunswick, Georgia, with Carter and the accused, and the manner in which the contracts of 22nd October, 1892, called the big contracts, were let out, and an examination of the progressive growth of Carter's wealth are of a nature to throw more light on the designs of the accused and of Carter, and consequently upon the whole case.

A. J. Twiggs states that in 1891 he went to Savannah with the object of bidding for the contract for the work to be done on the River Savannah at Augusta, which contract was let out to accused Gaynor on September 9th, 1891, and that he met accused Gaynor who offered him $500 and to take from him all the stone (Twiggs owned a quarry) if he would not bid for this work, which proposal Twiggs accepted. Then accused Gaynor had not filed his bid. He got the specifications in the presence of Twiggs, and commenced preparing his tender. Noticing the high price inscribed by accused Gaynor, Twiggs asked him if he did not fear some other bidder might file some lower bid. Gaynor answered "No other person intends to bid." Twiggs then mentioned that he had heard that one Mr. Denning, of Augusta, intended to file a bid. To that accused Gaynor replied "I will find out," and writing a letter he gave it to a messenger, who immediately brought an answer, and Gaynor having read it said "No, there is no other bid; we are all right." Accused Gaynor got the contract at the very high price he had mentioned.

The same Mr. Twiggs says that in 1893 some new work to be made near Augusta was advertised to be let out by contract. He went to Savannah to bid for that work. Edward Gaynor went to him and offered him with insistance, $1,000

for not bidding, which offer was refused. Twiggs tender being the lowest, the contract was let to him, number 5359, July 5th, 1893. After the bids were opened he was followed by Edward Gaynor to his hotel where Edward Gaynor renewed his offer, and asked Twiggs to abandon his contract, promising at the same time to protect him for his inexecution of the same, for Twiggs had guarantors. The offer was again refused.

Twiggs was familiar with the nature of the work to be done under his contract, for he had studied the work done by John F. Gaynor, below Augusta. He had also frequently visited the work done by W. H. Walsh in 1892, above Augusta, and W. H. Walsh having completed his work, Twiggs engaged his foreman and his men. The specifications in this contract of Twiggs were the same as in the executed contracts of John F. Gaynor and W. H. Walsh. Twiggs meant to proceed in the same way in the execution of his contract, and started using similar material. He had a great number of fascines prepared, precisely like those in the Gaynor and Walsh contracts, and with the same material, and by the same hands. But he was not permitted by Carter to put in any of these fascines. Carter examined them all, and said that none of them would do. He himself cut the string of one, trimmed off all the brush, leaving nothing but the naked poles, and had a fascine built in his presence made of poles without any brush, and declared he wanted all the fascines to be made that way, and the poles to be the whole length of the fascine. Twiggs' fascines were to be bound with wire, while the Gaynor fascines under similar specifications were tied with lath yarn. The lath yarn that Twiggs had procured and which Carter condemned had been bought from the very person who furnished it to Gaynor, and was part of an identical lot he had ordered for Gaynor, and which had been left over. The fascines put in the Gaynor contract were brush cut as near the work as they could get it, right on the river bank, bundled up with a rope choker, and the bundle was made from loose brush, limbs, leaves, and

everything together. Twiggs had to get his fascines from six to twenty-five miles down the river, and haul them up by steamboat. All the fascines made had to be re-made, and nothing but the bare poles used, and the brush was thrown away. Twiggs then went to Savannah where similar work was being carried on under the big contract of October 22nd, 1892, by the accused, to ascertain the manner in which the fascines were made. He got a row-boat and went where the fascines were used, and the lighter came down the river loaded with brush and in that were some fascines made of weeds and yellow flowers in them. They were brush, pine duck and vines. The fascines were not fastened there as he was himself required to do. He had to fasten down his with stakes six feet long and three inches in diameter, whilst in Savannah the accused were only required to fasten them down with pins 18 inches long, and 1½ inches in diameter, and it must be remembered that this was under the same specifications.

The Inspector required Twiggs to drive down his pins six feet in the ground, notwithstanding the difficulty of driving them by hand, the damage to the pins, and the length of time required, and Carter suggested to him to get a pile driver.

Twiggs says that hardships were put on him by Inspector Conant under the direct instructions of Carter, and conditions of construction were exacted from him which were not in the specifications, nor in the contract. He was required to use a chain choker to compress his fascines—the Gaynors were allowed to use a rope choker. Twiggs declares that on account of all sorts of difficulties put in his way by Carter, he was unable to complete his work in the time stipulated in his contract, and that Carter had it completed at his (Twiggs') expense, at exorbitant and unjust prices, paying as much as $1.50 per cubic yard for stone that he himself could have supplied from his own quarry at 75 cents.

Twiggs lost four thousand dollars on his small contract.

Thomas J. Agnew says that in September 1894 he went to the office of Captain Carter, that he met the head clerk

of Carter, who informed him that he had to apply to Carter personally for specifications. Agnew was representing E. B. Hunting & Co. who were acting jointly with R. G. Ross & C., of Jacksonville, Florida. He asked his family physician, Doctor Brandt, to apply for him for specifications. Captain Carter did not send any but wrote to Dr. Brandt that the specifications could be seen at his office. Agnew writes again on September 21st to Carter complaining of not having yet received the copies of specifications applied for, and asking Carter to give instructions to his clerk to send him some. Again Carter answers that the specifications can be seen at his office. Then Agnew gets them from the office. The bids are prepared by Ross & Co. for whom Agnew is acting. On September 29th, 1894, the day of the opening of the bids, Agnew goes to the office of Carter, and there he meets Edward H. Gaynor, and John F. Gaynor, the accused, who asked him if he intended to bid. Having said yes, they offered him $500 if he would refrain from bidding, but the offer was refused. Then the two Gaynors went into the office of Carter, where the bids were to be opened, and took an envelope out of two which were on Carter's desk and Edward Gaynor replaced it by another. This happened ten minutes before noon, which was the time set for opening of the bids. The bids being opened it was found that there were none from the Gaynors, nor from The Atlantic Contracting Company, but the lowest bidder was Anson M. Bangs, who got the contract at the price of $2.28 per cubic yard of mattress. But it afterwards turned out that Bangs was in reality Gaynor and Greene.

Charles P. Goodyear, a Barrister, of Brunswick, Georgia, states in his deposition that he attempted in 1891 to deepen the channel of Brunswick Harbour by placing dynamite on the bottom and under the bottom of the channel, and depending on the strong currents to wash out the sands loosened by the dynamite. Goodyear continued to use his dynamite process in 1892 under an Act of Congress granting

him compensation according to the depth obtained, the depth to be verified by Carter. In November, 1892, Goodyear went to Savannah, with his partner, Mr. W. E. Kay, to see Carter, who had made an inspection of his work. Carter told him that he had not reached the depth required by the Act, namely 22 or 23 feet, and asked him to have an interview with him alone. Carter declared to Goodyear that as an engineer he had been desirous of deepening the outer bar of Brunswick, Georgia, by the jetty system under a recommendation he had made for deepening that bar for a compensation of $2,718,000, that is, an estimate for that amount. "He stated that he recognized the fact that so long as I continued my work upon the bar by the method I was pursuing, the use of dynamite, the people of Brunswick would not support an effort to obtain the contract for jetties from the Government; that he recognized the fact that I had, as he expressed it, a good deal of influence in Washington, that he believed legislation would be procured for the deepening of the outer bar of Brunswick upon the basis of the recommendation of $2,718,000 by the construction of jetties; that it would be necessary if such an arrangement was carried through that he should remain at Savannah; that it would require to retain him there the influence not only of the people of Savannah, but, perhaps, the influence of the people of Brunswick. He said that he had in his mind a firm of honest contractors who would get the contract for the work if the Act of Congress could be passed appropriating the money for the jetty system. He said that if I would abandon my dynamite method, abandon the work on the bar, and procure the influence of the people of Brunswick, which he said he recognized was behind me, and would be governed by my action, and go to Washington, and do what I could to procure the passing of this legislation, that he would procure my reimbursement for all the money I had spent to that time on the outer bar of Brunswick, that he would procure all my expenses paid to Washington, and that he would procure payment of one-

third of all the profits on the jetty enterprise in the event the Act was passed."

Goodyear continues:

"He, Carter, then told me who the contractors were, that they were Greene and Gaynor, and that I said that it would be well to have some confirmation from the contractors in a proposition of that sort, upon which he sent for John Gaynor, and John Gaynor came into the room and participated in the balance of the interview, confirming the statements that Carter had made with one exception. Carter had created the impression in my mind that it was proposed to reimburse me at once for my outlays on the bar at Brunswick, then an inconsiderable amount, about $16,000, to pay my expenses to Washington, and pay me one third the profits. He confirmed the proposition made by Carter with the exception of the proposition in relation to the $16,000, which was only to be paid me in the event the legislation was procured for deepening the outer bar by jetties."

Goodyear said to Gaynor: "I have had some discussion with Carter about jetties getting water on this bar." Gaynor replied, "What do you care about water? The thing to get is money." Goodyear says that one-third of $750,000 was mentioned as being the probable third of the profits, on the basis of Carter's suggestion for the appropriation of $2,718,000, and in the conversation Carter stated that there would be a division of the profits by three, one part for Goodyear, and one part would be set aside for a purpose not declared.

In December, 1892, Goodyear was visited at Brunswick by John Gaynor and Edward Gaynor, and was urged to accept the proposition, but he declined.

The Savannah contract of October 22nd, 1892, throughout known as the big contract of 1892, was a three and a quarter million dollar contract.

The specifications were for three designs of mattress, at the selection of the engineer in charge, and to be bid

upon at one price, which was $3.80 per cubic yard. Under this contract Carter called for the third design, that is to say, the one most advantageous to the contractors by its construction, and by the material which composed it, and the most detrimental to the United States. It is under this contract that the construction of the multiple mats was begun, and that the sinking separately of each mattress was discontinued, a system greatly to the benefit of the contractors and greatly injurious to the United States.

What has been said above concerning the execution of the work under the 1896 contracts applies to this 1892 contract, and I refer to the résumé already made of the evidence of Mr. Cooper and Captain Gillette.

In the Cumberland Sound contract of the 16th September, 1892, let to Edward H. Gaynor, the specifications were the same in regard to the three designs of mattress at the option of the engineer in charge, and to be bid at one price, which was $4.20 per cubic yard. The third design was adopted also by Carter in this contract.

Captain Gillette was of the opinion that there was ten per cent. more brush material in the second design than in the third, and that the specifications for the second design called for more particularity of construction, so that it would, for the reasons stated, be at least twenty-five per cent. more costly. The first design was also very much more costly than the third. It had, in addition, a raft of 12 inch logs, which Captain Gillette says would cost the contractor about 40 cents per square yard. Assistant Engineer Cooper corroborates Captain Gillette on this matter.

The evidence of Captain Gillette and of Mr. Cooper in reference to the 1896 contracts and the fraudulent construction of the mattresses apply exactly to the 1892 contracts, and it is not necessary to repeat them.

It was part of Captain Carter's duty, as disbursing officer, to approve all legitimate claims arising out of the execution of the different contracts let out to the accused, and pay these claims. To effect the payment of claims he would

demand the necessary money from the Treasurer of the United States, who would put it to his credit with the Assistant Treasurer of the United States at New York. These payments would be made at the beginning of each month for work of a proceeding month, by cheques payable in two batches, one batch of these was deposited in local banks at Savannah, and the proceeds went for the payment of ex penses in carrying on the work, and for wages and salaries, and the other batch was sent to New York and deposited there to the credit of one of the contractors, and the proceeds divided as profits between the partners. Mr. E. I. Johnson, the expert accountant and bank examiner, has separated the cheques supposed to have gone for the carrying on of the work at Savannah, and the cheques supposed to have represented the profits of the enterprises. He has prepared a table, Exhibit 319, showing 32 supposed monthly divisions of profits, on the assumption that they were to be divided by thirds, and the result of his work is highly illustrative and instructive. The thirty two different parts of this Exhibit 319 presume to show the reception of the cheques in New York by one of the contractors, the payment by him of the supposed share due to the other contractor, the payment of a similar share to a third party unknown, the keeping for himself the balance, and corresponding reception into his exchequer by Carter of a sum equivalent to a third of the assumed profits and the investments made by Carter on or about the dates of the payments by him of the contractors claims, and the division by the contractors of the funds received .

It was noticed by Mr. Johnson that on many occasions the unknown appeared to receive sometimes $75, and some times $150 more than the two accused, and it was found that when this occurred, Carter was in New York at the time of the division. When $150 were added to the supposed third of the unknown, this fact was explained by the presence of Carter in New York after two successive divisions. This peculiarity is to be noticed because the payment of $75 was

always omitted when Carter was not in New York at the time of the division. Some of the divisions of the cheques received in New York by the accused as representing the supposed profits show that these cheques were exactly divided into three, and that Carter received the same day exactly a sum corresponding to one-third. By division 9, for example, it is shown that a deposit was made to the credit of William T. Gaynor, in the American Exchange National Bank, of a cheque for $39,075, being the cheque of Carter of August 3rd, 1893. On August 7th, Carter was in New York. $39,075 less the $75, divided into three, makes three parts of $13,000 each. On the same day, 7th August, 1893, William T. Gaynor withdrew from the bank exactly $13,075 by cheque. Two days after this withdrawal of $13,075 there is a deposit with Reed & Flagg, Brokers, in currency, of $13,000 and a cheque for $390, in all $13,390. This deposit was invested by Reed and Flagg in ten Delaware and Hudson bonds at a cost price of $12,825, and the difference between $13,390 and this latter sum of $12,825 was returned by Reid and Flagg by cheque for $565, dated August 10th, 1893, in favor of R. F. Westcott, or O. M. Carter.

I may state here that Carter had a power of attorney from his father in-law, Mr. Westcott, who was frequently travelling abroad, and that investments were often made by Carter in the name of Mr. Westcott, but Mr. Westcott has testified that those investments were made by Carter with his own money and for his own benefit, and that the securities bought were his (Carter's) absolute property.

Anyhow, this cheque of Reed and Flagg for $565 was deposited on the 11th August, by Carter, to his own credit. It is in evidence that on September 1st, 1893; March 2nd, October 8th, 1896, and March 6th, 1897, Carter collected the interest on these same Delaware and Hudson bonds. Besides that, these identical ten Delaware and Hudson bonds are enumerated in Carter's final receipt of securities to Westcott on October 29th, 1897, showing conclusively that they were his property.

The second division of January 3rd, 1893, Exhibit 319, is the first supposed division under the big contracts of 1892. The amount to be divided into three parts is made to appear to have been $38,700.12, which by thirds makes $12,900. It is proven that on January 3rd, 1893, Carter deposited to his credit with the Union Trust Company, and with Van de Venter, broker, $12,900.

Division 7 of June 5th, 1893, shows the amount supposed to be divided in three was $37,500, of which one-third is $12,500, and the evidence makes out that on the next day, June 6th, 1893, there is deposited with Van de Venter, again in the name of R. F. Westcott, an amount of $12,500 in currency, invested in ten Milwaukee, Lake Shore and Western bonds, on which Carter is shown to have collected the coupons, and which bonds are included in Carter's final recept to Westcott of October 29th, 1897, and Kellogg and Rose, the attorneys for Carter, received the cheque for the coupons on these identical bonds November 14th, 1900, so there can be no doubt as to Carter's ownership of these bonds.

Now as another illustration let us take division 27, of June 7th 1895. The amounts supposed to be available for division in the hands of accused Gaynor was $56,231.43, of which one third is $18,743.81. On June 7th Gaynor issues his cheques in favour of Greene for $18,743.81 and in favour of an unkown party for $18,818.81 which is $18,-743.81, and $75. Carter was in New York that day, and on the same date there was deposited to the account of R. F. Westcott, with Reed and Flagg, Brokers, currency $9,500 which was invested in securities on which Carter drew the interest ,and which are included in Carter's final receipt of October 29th 1897, to Westcott. The difference between Carter's supposed share ($18,818.81) and the amount invested ($9,500) may be accounted for by an investment following the presumed subsequent division of the next month, number 28, for a larger amount than the one supposed to have been then received.

Let us now examine the supposed division of July 11th 1893, number 8. The amount to be divided then was $108,000, one third of which is $36,000 and there was issued on that day by accused Greene a cheque in favour of an unknown party for $36,075. Carter was in New York that day, and on this same 11th July there is deposited in the name of Westcott, with Reed and Flagg, currency $34,500. The securities bought with this money are traced into Carter's receipt to Westcott of October 29th 1897, and Carter is shown to have collected the interest on these same securities.

The last supposed division, that is, that of July 6th 1897, number 32, of the cheques mentioned in this complaint, aggregating $575,749.90 (to wit $345,000 for Cumberland Sound and $230,749.90 for Savannah Harbour, for the work supposed to have been done from December 1896 to July 1897) no monthly payments having been made, because no appropriation had been made by Congress for this work, does not show any cheques issued that day in favour of the unknown, or any investment by Carter at this corresponding date. The amount available for division according to the theory of Johnson, deduction being made of the advances for carrying on the work which had to be returned, was $380,-075, of which sum a third is $126,691.67. The two cheques were deposited by Greene to his account, and he paid over his third to Gaynor but apparently kept two thirds for himself, which was unusual. Carter's interest in this division, if he was entitled to a share, would have amounted with his advance of $50,000 to $176,766.67. On July 8th Greene buys 150 United States five per cent. bonds at a cost of $172,500 a portion of which bonds was sold on August 6th for $22,700 and immediately a cheque was sent by Greene to Westcott for $21,000 which was returned to him for account of Carter on monies advanced by Westcott to Greene at Carter's request. Greene was then paying the indebtedness of Carter.

Amongst the other divisions as shown by Mr. Johnson in his table, there are many which show an exact division into

thirds, and a receipt by Carter of a sum corresponding to one third at the exact date of the division, and its investment on his behalf.

From the review of this latter part of the evidence it is manifest that Carter and the accused had guilty intents and motives; that they were really in partnership for the execution of Government work in the district of Savannah; that their common design was to secure by fraudulent devices all the contracts let out in the district, at exorbitant prices, which contracts were fraudulently executed by accused with the knowledge, permission and help of Carter, whose payment for his betrayal of the duties of his office was a share in the profits, which he received as is fully established by the evidence of Mr. Johnson, who proved the divisions of monthly profits, aggregating for Carter to about $722,528.02, and by Mr. Westcott who proved the surprising ownership by Carter of securities and property worth $570,801.85.

Besides, the fact of a conspiracy having existed between accused and Carter, is only mildly denied, the defence taking the position that no crime other, than conspiracy to defraud is shown by the evidence, arguing that the prosecution has in the past so interpreted the evidence itself, and that it was not reasonable at present to construe the facts proven as constituting other crimes than conspiracy. The defence has even tried to have one of their witnesses (Mr. Rose) who had been counsel for the accused and for Carter, in the United States, so declare by such questions as the following:

Q.—Now you are familiar with all the facts of this case?

A.—Tolerably, from an acquaintance with them for eight years.

Q.—Under the laws of the United States, if the accused can be charged with any crime, what crime would it be?

This question was objected to on the ground that it was not the province of the witness to make deduction from the facts, and the objection was maintained. In arguing it, Mr. Taschereau said: Mr. Taschereau K. C: "I have a right to prove under the Treaty that the facts charged here do not constitute an extradition crime, but constitute something else

not an extradition crime..... I am showing by a man who knows what these offences in the United States constitute. Some facts have been proven. The United States have been at this case quite a number of years. When Gaynor and Greene were in the States it was always considered as a conspiracy to defraud, and presenting false claims, and indictments were brought against them by the Grand Jury for those offences. It is admitted by everyone that these crimes do not come within the Treaty. Now, to bring them within the Treaty what do they do? They take the same facts and the same evidence, and call it something else."

Mr. MacMaster K. C: "The Privy Council say you can do that."

Mr. Taschereau K. C.: "The Privy Council never said any thing of the kind. They said, having brought that charge, that does not close the door to any other charge, but you bring the same evidence on these charges which you found in the States, and now to bring them within the Treaty you call it something else. Now, I have the right to bring on a United States lawyer to show that these facts in the United States contitute the crime of conspiracy to defraud and presenting false claims, and that is not within the Treaty. To use the terms of the Act, this is not an extradition crime."

On page 28, the following question is put to Mr. Rose:

"Q.—Will you state Mr. Rose, what crime, if any, is shown by the evidence for the prosecution produced in this case, and taken before Commissioner Shields?

On page 30 this question:

Q.—Will you state what offence is disclosed by the evidence of the prosecution taken before Commissioner Shields, and imported into this case, under the federal laws of the United States?".....

Mr. Taschereau K. C.: "Supposing there would be a provision in the United States statutes to the effect that all these offences would only amount to conspiracy to defraud, and nothing else, surely we have a right to point that out to your honour."

So, from the evidence, and these statements, there can be no doubt whatever, that the allegation of conspiracy is overwhelmingly proven. Besides it is to be noted that the facts proven by the prosecution are not controverted and that the accused are fugitives from justice which in itself is a suspicious circumstance.

Now let us see what effect this evidence has as to the crime specifically charged against the accused.

We have seen that the object of the conspiracy was the fraudulent obtaining at exorbitant prices, of contracts for work to be done in the district of Savannah, with a view to fraudulently executing these contracts by not furnishing the material and labour contracted for, and by means of fraudulent and false claims presented to and approved by Captain Carter, unduly obtaining the moneys of the United States.

Carter was arrested, and charged in the United States, with having conspired with the accused and other persons, to defraud the United States in the manner and form alleged in the information in this case, under Section 5438, and with having "caused to be made certain false and fraudulent claims against the United States, and in favor of The Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit, the claims for the payment of $230,749.90 and for $345,000 in July, 1897, which which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into contracts dated October 8th, 1896, to furnish the United States certain mattresses, stone and other material of specified kinds and qualities for constructing works in said river and harbor district, to furnish and put into said works, mattresses, stone and other material different from, inferior to, cheaper, and of less value to the United States, than those contracted for, and by receiving and accepting, and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of said vouchers, well knowing that the mattresses, stone and other material

charged for in said vouchers, as having been furnished, had not in fact been furnished, each of the said claims having been made in or about the month named in the above description of the voucher relating to it.

This was in contravention of Sections 5438 and 5440 of the Revised Statutes of the United States, which are as follows:

5438: "Every person who makes, or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States any claim upon or against the Government of the United States, or any department or officer thereof knowing such claims to be false, fictitious or fraudulent, or who for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody or control of any money or other public property, used or to be used in the military or naval service, who with intent to defraud the United States, or wilfully to conceal such money or other property, delivers or causes to be delivered to any other person having authority to receive the same, any amount of such money or property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases,

or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

Section 5440 is as follows: "If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars and to imprisonment not more than two years."

Carter was also charged with embezzling the aforesaid two sums of $230,749.90 and $345,000 under section 5488 of the Revised Statutes of the United States, which is as follows:

5488: "Every disbursing officer of the United States who deposits any public money intrusted to him in any place, or in any manner, except as authorized by law, or converts to his own use in any way whatever or loans with or without interest, or for any purpose not prescribed by law, withdraws from the Treasurer or any Assistant Treasurer, or any authorized depositary, or for any purpose not prescribed by law transfers or applies any portion of the public money entrusted to him, is, in every such act, deemed guilty of an embezzlement of the moneys so deposited, converted, loaned, withdrawn, transferred or applied, and shall be punished by imprisonment with hard labor for a term not less than one year, nor more than ten years, or by a fine of not more than the amount embezzled, or less than one thousand dollars, or by both such fine and imprisonment."

Carter was found guilty or these three charges as laid.

The Supreme Court of the United States, before which the case was carried, on a writ of habeas corpus, declared that the conviction of conspiracy and of causing to be presented false and fraudulent claims, was conviction of fraud. (Carter vs. McClaughry, Supreme Court of United States, 1901.) And I have no doubt that under our law if a public officer occupying under the Government of Canada, an office corresponding to that held by Carter under the Government of the United States, would conspire with contractors for public works to defraud the Government of Canada in the manner that Carter did, and would have presented to him for approval and payment false and fraudulent claims, and would approve and pay the same, he would be guilty of fraud and breach of trust, and liable to be prosecuted under section 135 of our Criminal Code, and committed for trial upon such evidence as is adduced before me here.

It is, besides, determined by our law that all those who would have participated in his offence would be liable to be prosecuted as principals (the distinction between principals and accessories having been abolished) and this by virtue of section 61 of the Criminal Code of 1892. That section is in the following terms:

61.—Every one is a party to and guilty of an offence who

(*a*) Actually commits it; or

(*b*) Does or omits an act for the purpose of aiding any person to commit the offence; or

(*c*) Abets any person in commission of the offence; or

(*d*) Counsels or procures any person to commit the offence.

2.—If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein,, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose. This is the application of the legal maxim *Qui facit per alium facit per se.*

In fact, the two prisoners are accused before me with having participated in the fraud committed by Carter, by officer and agent of the United States, fraudulent claims jointly causing to be made and presented to said Carter, an officer and agent of the United States, fraudulent claims against the Government of the United States for his approval and payment to the amount of $575,749.90, knowing the same to be fraudulent and false.

Have the accused participated in the specific offences of fraud committed by Carter in the manner provided by Section 61? To participate is the act or state of sharing in common with others (Webster's Dictionary).

Participate:—To take equal shares and proportions—to share or divide (Bouvier's Law Dictionary).

In law, by the fact of conspiring, the acts of one to effect and obtain the common design become the acts of all, for which all are liable. The fraud committed by Carter by transferring his loyal services from the Government of the United States, to his co-conspirators, and approving and paying to them fraudulent claims, was perpetrated to effect the object of the conspiracy. His fraud has become the fraud of all, and in the commission of said fraud, he had been aided and abetted by the accused, and has been counselled and procured by accused to commit it.

In Taschereau's Criminal Code, under section 61, the following authorities are cited:

"The procurement (to commit an offence) may be direct, by hire, counsel, command, or conspiracy." 2 Hawkins, ch. 29, s. 16.

"There is participation in the offence committed by one, if several persons combine for an unlawful purpose to be carried into effect by unlawful means.

There must also be a participation in the act, for although a man be present whilst a felony is committed, if he take no part in it, and does not act in concert with those who committed it, he will not be a principal in the second degree merely because he did not endeavour to prevent the felony

or apprehend the felon." 1 Hale 439, Taschereau's C...

"So a participation, the result of a concerted desig... commit a specific offence is sufficient to constitute a prin... in the second degree."

Taschereau's Code, pages 32-33.

"So likewise, if several persons combined for an u... ful purpose to be carried into effect by unlawful m... Taschereau's Code, page 33, citing Foster 351-352.

"An accessory before the fact is he who being absen... the time of the felony committed doth yet procure, cou... command, or abet another to commit a felony." 1 Hale ...

"Conspiracy is solicitation, and something more." ... Bishop Criminal Law, see 767-762.

"Participation simply means being accessory before ... fact." Archbold, 284-285, 22nd edition.

"1.—(A.) An aider and abettor may be tried as a ... cipal.

(B). The evidence is such a case must show a com... criminal intent with the principal and an actual or cons... tive participation in the commission of the offence."

Regina vs Graham, 2 Canadian Criminal Cases, ... Ouimet, J.

These authorities, and section 61 cited, make it evi... that the accused by their corrupt agreement with Ca... became parties to all the acts done by him (Carter) in ... to effect the object of the conspiracy, and which are pu... able, and conspiracy being solicitation and procurement ... sides section 61, paragraph 2 of section 62 also make the ... spirators parties to the offences committed by one of ... number.

Now, is fraud an extraditable crime?

Extradition takes place for the fraud committed by ... different persons mentioned in clause 4 of the Treaty, w... is in these terms:

Section 4.—"Fraud by a bailee, banker, agent, f... trustee, or director, or member, or officer of any comp... made criminal by the laws of both countries."

Carter was an agent and trustee of the United States. By his appointment he had authority to act and bind his principal, the Government of the United States, and by section 1153 of the Revised Statutes of the United States, which is proven, the duties are imposed upon an engineer engaged as he was, about the construction of any public work, to disburse moneys applicable to the same, etc. It formed part of his duties to pay over to contractors the moneys entrusted to him by the Government of the United States for this object, and any fraud committed by him in his official capacity was fraud by an agent and trustee.

But is the fraud and breach of trust committed by Carter punishable by the laws of both countries, a condition which is required by section 4 of the Treaty, to make it extraditable?

We have seen that such a fraud and breach of trust would be punished in Canada by section 135 of our Criminal Code. It would also, it seems, be the object of criminal prosecution under the common law. The following authorities show this:

"Fraud: To be the object of criminal prosecution must be of that kind which is in its nature calculated to defraud numbers, as false wights, or measures, false tokens, or where there is a conspiracy," per Lord Mansfield, R. vs Wheatley, 2 Bur. 1125. Taschereau's Code, Sect. 395, Note.

In Russell on Crimes, under the caption, "Cheats and Frauds at Common Law," we read: "Those cheats which are levelled against the public justice of the Kingdom are indictable at common law."

Russell on Crimes, p. 454 (6th Ed., Vol. 2).

And under the same head, he says: "In some cases, the rendering of false accounts and fraud practised by persons in official situations, have been deemed so affecting the public as to be indictable, thus where two persons were indicted for enabling persons to pass their accounts with the pay office, in such a way as to enable them to defraud the Government, and it was objected that it was only a private

matter of account, and not indictable, the Court held otherwise, as it related to the public revenue. And instances appear in the books of indictments against overseers of the poor for refusing to account, and for rendering false accounts."

1 Russel on Crimes, p. 422.

2 Woolrych, Criminal Law, p. 611.

3 Chitty Criminal Law, p. 701. z

In 2 Russell on Crimes, 457-458, Mr. Russell cites a case where two persons were jointly indicted for corruptly bargaining and selling to a third person a lot of wine under certain false representations, and Mr. Russell says, at page 462, " Upon this case considerable doubts were entertained, but it seems that ultimately judgment was given for the Crown, and that the true ground of such judgment was that it was a case of conspiracy." See also 2 East P.C., chap. 18, sec. 2 and 6, pp. 817, 823-4.

" Where two agree to carry it (a conspiracy) into effect, the very plot is an act itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced if lawful, is punishable if for a criminal object, or for the use of criminal means."

Archbold Cr. P. and P., 22nd Ed., page 1209. Willes J. in Mulcahy vs. R., Law Reports, 3 H.L. 306-317. Bishop Cr. Prac., sec. 205, 206.

Mr. Archbold says: " Many of the decisions that a conspiracy to cheat or defraud is indictable turn on facts which proved that the cheat or fraud was itself indictable at common law or by statute."

Archbold Cr. P. and P., p. 1211.

" And if the parties conspire to obtain money by false pretences of existing facts it seems to be no objection to the indictment for conspiracy that the money was to be obtained through the medium of a contract." Arch. Cr., P. and P., p. 1211.

In the United States, the offences committed by Carter were punished by provisions of the Federal statutory law,

and could not be otherwise, as under the laws of the United States, they were not crimes at common law. Besides, there is not in the Federal law any offence specificially known by the name of fraud. Carter was prosecuted for conspiracy to defraud, and causing false and fraudulent claims to be made for his approval and payment under sections 5438 and 5440 which have been already cited.

The Supreme Court of the United States, the highest body to interpret the law in that country, in the case of Carter vs. McClaughry, on a writ of *habeas corpus* for the release of Captain Carter, p. 23 of the report of this case, has declared that conviction on charges of conspiracy by Carter to defraud the United States, and of causing false and fraudulent claims to be made for approval and payment by him, was conviction of "fraud." This opinion shows that fraud is punished as such by the laws of the United States.

The fraud committed by Carter being made criminal by the laws of both countries, a condition exacted by section 4 of the Treaty, it follows that the fraud of Carter constitutes an extradition crime.

It is true that the crime of fraud and breach of trust so committed by Carter does not bear the specific name of fraud, under the law of the United States applicable to it, as it does under our law, but there is absolute identity in substance between the offence of fraud by a public officer under our law, and the offence put to the charge of Carter and punished as fraud by the laws of the United States, as declared by the Supreme Court of the United States, and the same evidence is required in support in both instances. It is not the name of the offence that is punished, it is the overt act that is made criminal, the transaction itself.

This reasonable and beneficial principle has been affirmed by the Supreme Court of the United States in the case of Wright vs. Henkel, 190, U.S. [58].

"Absolute identity is not required. The essential character of the transaction is the same, and made criminal

by both statutes (The English and the United States statutes).

To like effect was the decision of the Queen's Bench Division in Bellencontre's case (1891) under the Treaty with France under a similar clause providing for extradition for fraud by a baillee, banker, agent, factor, or trustee.

The French warrant charged the defendant, a Notary, with having embezzled or misappropriated to the injury of a certain person named, a certain specified sum of money delivered to him, in his capacity of Notary. There were a number of such transactions charged in the warrant.

In the warrant issued by the English magistrate, the charge is stated that the defendant is accused of the commission of the crime of Fraud by a bailee within the jurisdiction of the French Republic.

The final commitment of the Magistrate was for the crimes of "Fraud by a bailee and frauds as an agent" within the jurisdiction of the French Republic.

In re Bellencontre, 2 Law Reports, Q.B. (1891), p. 122. In that case the portion of the French statute held applicable was as follows:

"Whoever shall have embezzled or misappropriated to the injury of the owner, possessors, or holders, any effects, money, etc., which shall have been delivered to him only in right of hire or deposit upon the condition to employ them for a specific purpose, will be punished."

The English statute applicable was as follows (p. 126):

"Whoever being attorney or agent and being intrusted with the property of any other person for safe custody shall, with intent to defraud . . . in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so entrusted, shall be guilty of a misdemeanor, etc."

It was held that these statutes came within the class of "Fraud by a bailee or agent" and the commitment was sustained.

And the Court held (p. 136) in that case, that although the English statutes did not provide for the punishment of bailees, as such, that where the *evidence* showed fraud by a bailee, who was also an agent, it was sufficient to bring it within the terms of the English Statute as to misappropriation by attorneys or agents above quoted.

And the Court further say (p.139):

" Embezzlement means nothing more nor less than fraudulent misappropriation, and although it is called embezzlement by a clerk or servant, because it is only in that case it is made punishable *under that name*, yet the thing actually exists in other cases than those of a clerk or servant, and is made punishable in the case of a banker, merchant, factor, or agent by those sections of the Act of 1866, to which I have referred."

And the Court, after stating that the French statute was much broader than the English statute, and punished some acts which the English Statute did not, say (p. 138):

"We have therefore to see whether the *facts* laid before the magistrate justified him in coming to the conclusion that there was a prima facie case made out of an offence against the English law..... or what would be a crime by English law."

To like effect Ex-Parte Piot, 15 Cox's Criminal Cases (Q.B.D.) 208.

And in the case of Arton, where the difficulty was greater, because there was not only a difference in the names of the offences in both laws, but there was also a difference in the two versions of the Treaty (the French and English). Lord Russel of Killowen, in rendering judgment in this case, said:

" Evidence of the crime of falsification of accounts according to English law not amounting to forgery according to that law, and within the 18th head of Art. 3 of the treaty (English version); evidence also, that the crime of falsification is a crime according to French law, ranging itself, ac-

cording to that law, under the head of forgery and within head 2 of Art. 3 of the treaty (French version). Why, then, is it not to be regarded as an extradition crime? I see no valid reason. English law, as I have said, treats some acts of falsification of accounts as forgery, but does not treat all of them as such. The French law on the other hand (as we must conclude, on the evidence of fact before us) treats such falsification of accounts as alleged in this case as forgery, within Art. 147 of the Code Penal. Is extradition to be refused in respect of acts covered by the treaty, and gravely criminal according to the law of both countries, because in the particular case the falsification of accounts is not forgery according to English law, but falls under the head according to French law? *I think not.* To decide so would be to hinder the working and narrow the operation of most salutary international arrangements. It seems to me, therefore, that all the conditions which I have mentioned have in this case been fulfilled. In my judgment these treaties ought to receive liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent. I know no head of the French law for which an exact equivalent is to be found in the law of England. The English and French texts of the treaty are not translations of one another. They are different versions, but versions which on the whole are in substantial agreement. We are here dealing with a crime alleged to have been committed against the law of France; and if we find, as I hold that we do, that such a crime is a crime against the law of both countries, and is, in substance, to be found in each version of the treaty, although under different heads, we are bound to give effect to the claim for extradition."

The same principle has been recognized by the late Judge Wurtele in Ex-parte Seitz, 3 Can. Cr. Cas. 127.

And in re F. H. Martin, 33 L.C.J. 253, it was held: "That though the offences were known in the State of Minnesota and in Canada by different names, nevertheless the same facts constituted and the same evidence would prove, a crime in each country and the name was immaterial."

In re Regina vs Dix (18 T.L.R. 231) the accused was charged with larceny by embezzlement according to American law. It was held that: "As the evidence showed fraud by a bailee, banker etc., under section 81 of the Larceny Act, an offence within the Treaty, the accused could be extra dited". In Reg vs Kohn (L.J. Supp. 1900, p. 173) the requisition and original warrant was for false pretences. The magistrate altered the charge in the warrant of commitment to fraud by an agent, and larceny as a bailee. According to German law what the prisoner was said to have done was obtaining goods by false pretences, but it was not so according to English law, but was an offence of another kind. The act was the same, but it was called by a different name in each county. The magistrate simply changed the description of the offence into the description under which the act alleged was known in English law. If that could not be done, extradition treaties would be of no value. (Grantham, J.)

PARTICIPATION IN FRAUD.

As I have said before, under our law the accused would be parties by their conspiracy with Carter to the offence of fraud and breach of trust committed by Carter, and punishable as principals.

Now, would they be punishable under the laws of the United States for their participation in the fraud and breach of trust committed by Carter, by conspiring to defraud the United States, and causing false and fraudulent claims to be presented to him for approval and payment?

The offences contemplated by sections 5438 and 5440 are not declared to be felonies. They are misdemeanors. For having violated them Carter was convicted of "*fraud*". Mr. Erwin for the prosecution, testifies that aiders and abettors, counsellors and procurers in misdemeanors are punishable as principals in the United States. In support of this affirmation the following authorities and decisions have been cited: U. S. vs Snyder 14 Federal Reporter 554, where it is stated "The offence is a statutory misdemeanor and it is well set-

tled that all who aid, abet, procure or advise the commission of a misdemeanor are guilty as principals."

1 Russell on Crimes 9th ed., p. 1601.

"And this is the rule whether the misdemeanor is created by statute or by the common law". U. S. vs Mills, 7 Peters 138.

" When Congress creates a statutory misdemeanor we must assume that it is done with the above well settled rules of law in view, and if so with the intent that aiders and abettors as well as the actual doers of a crime may be punished under it. Although the defendant Bertham not being postmaster was incapable of being the principal actor in the commission of the crime, he may nevertheless be held to be an aider, procurer and abettor, and therefore in law a principal.",U.S. vs Snyder, 14 Fed. Rep. 554.

Mr. Rose and Mr. Lindsay, two experts in law, examined by the defence, have given on this point opinions contrary to that of Mr. Erwin, but no authorities were cited by them in support. I must accept the theory of the prosecution that participation by accused in the fraud committed by Carter is punished by the law of the United States, because, first, the evidence is conflicting, and second, because it is supported by authority.

Section 10 of the Treaty says: " Extradition is also to take place for participation in any of the crimes mentioned in this convention, or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries.

I hold that by their conspiracy, accused have participated in the overt acts done by Carter in furtherance of the conspiracy, and charged as misdemeanors, namely, in his offence of fraud as agent and trustee, and as the offence of fraud by an agent and trustee is mentioned in the Treaty and is punished by the laws of both countries, and the participation therein is also punished by the laws of both countries, and is made a ground for extradition by section 10 of the Treaty, the accused would be liable to extradition on this ground, if all other conditions for an extradition have been fulfilled.

PARTICIPATION IN EMBEZZLEMENT.

The second ground of the United States for demanding the extradition of the accused is that they participated in the embezzlement committed by Oberlin M. Carter by (*a*) soliciting, counselling, moving, aiding and procuring said Oberlin M. Carter, the officer, agent and trustee intrusted with said public money of the United States knowingly to apply the same to a purpose not prescribed by law, to wit, to the payment of fraudulent claims against the Government of the United States, to the amount of $575,749.90.

(*b*) By knowingly having applied the said sum of $575,749.90 of the public money of the said United States received by them from said Oberlin M. Carter, as such officer, agent, and trustee knowing the same to have been fraudulently obtained by said Carter, to the payment of fraudulent claims against the Government of the United States, to the amount of $575,749.90 by them caused to be presented to said Oberlin M. Carter for approval and payment by him as such officer, agent, and trustee, that being an application of said money for a purpose not prescribed by law.

On July 6th, 1897, Carter paid to accused in two cheques, the sum of $575,749.90 on claims which he knew to be false, and fraudulent, which claims were presented by the accused.

This payment of Carter to accused was an overt act resulting, and in furtherance of the corrupt agreement existing between them to defraud the United States.

Carter was prosecuted for having embezzled this sum of money, and convicted under section 5488 of the Revised Statutes of the United States already cited.

This money had been entrusted to Carter by the United States, upon his demand, and in his official capacity, for the purpose of paying just claims due by the United States. To the full knowledge of Carter this money was not due to the accused, who had not given the United States the work, material, labour, and ability contracted for. Their claims were fraudulent, and were fraudulently approved by Carter, and

there is no doubt in my mind that he was guilty of embezzlement according to section 5488 of the Revised Statutes of the United States.

The distinction between larceny and embezzlement has been done away with by our Criminal Code, and at present former larceny and embezzlement are included in the generic term of "theft." A study of the offence known as embezzlement, before the Code, does not convince me that the embezzlement of Carter under the United States law would have constituted the crime of embezzlement according to our law before the Code was passed. Then embezzlement was the unlawful appropriation to his own use by a servant, or clerk, or public officer, of money or chattels received by him for and on account of his master or employer..... It differs from larceny by clerks, or servants, or public officers, in this respect, to quote from Harris, "Embezzlement is committed in respect of property which is not at the time in the actual possession of the owner, whilst in larceny it is. An example will illustrate the distinction. A clerk receives twenty pounds from a person in payment for some goods sold by his master. He at once puts it in his pocket, appropriating it to his own use. This is embezzlement. The clerk appropriates to his own use twenty pounds, which he takes from the till. This is larceny (Harris, page 226).

See also case cited by Archbold, page 400, 21st edition, under the title "Larceny" (4thly). As to cases (of larceny) where, although there is a delivery of the goods by the owner, yet the possession in law remains in him.

And Harris, page 205, under the same title.

This is not the case with Carter. The money that he received from the Treasurer of the United States was in the possession of the Government of the United States, and by its changing of hands this money did not cease to be still in the legal and constructive possession of the Government. It was only for the time being in the custody of Carter. He was the servant of the Government and the legal possession remained with the Government, for, as our criminal code

says (k) Having in one's possession includes not only having in one's personal possession, but also knowingly (1) having in the actual possession or custody of any other person (Criminal Code, 1892, Sect. 3).

Regina vs Graham, 13 Cox, 57.

Re Parsons, 16 Cox, 498.

And so long as this money was not given to accused, Carter was possessing for the United States.

Section 305, Criminal Code, defines theft:

" Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person anything capable of being stolen, with intent (*a*) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest.

2.—The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

3.—It is immaterial whether the thing converted was taken for the purpose of conversion or whether it was at the time of the conversion in the lawful possession of the person converting."

According to my interpretation of the law and my appreciation of the transaction under examination, this transaction of Carter would not have constituted embezzlement under our former criminal law but would then have been larceny, and would now be theft by a public officer, punished by section 319 (*c*) of our Criminal Code.

319.—Every one is guilty of an indictable offence and liable to fourteen years imprisonment, who:

(*c*) Being employed in the service of His Majesty, or of the Government of Canada or the Government of any Province of Canada, or of any municipality steals anything in his possession by virtue of his employment, and also punishable at common law.

To constitute one guilty of theft it is not necessary that the thief should appropriate or convert the thing stolen to

his own use, but converting to the use of any person is sufficient. So if a servant without authority gives away to another person the property of his master, he is guilty of theft.

"An unauthorized gift by the servant of his master's goods is as much a felony as if he sold or pawned them," Reg. vs. White, 9 C. and P. 344. Archbold, under the subject already referred to.

In the present case, though there are good reasons to presume that Carter got his share of the money so fraudulently given by him to accused, whether he did or not is immaterial for the appreciation of his act.

Theft and embezzlement are both extradition crimes by Section 3 of the Treaty, and are punished by the laws of both countries, and by section 10, extradition is to take place for participation in these crimes, provided such participation be punishable by the laws of both countries.

The accused, by their conspiracy with Carter, have participated in the crime of embezzlement (theft, under our law) committed by him, and this participation would be punishable here under Section 61 and 62 of the Criminal Code.

Embezzlement under the laws of the United States is a statutory misdemeanour, and aiders, counsellors, procurers and abettors, in misdemeanors as has been seen before, are punished as principals.

Besides, it seems as if the participation of the accused therein was directly and specifically punished by Section 5497, Revised Statutes of the United States:

5497: "Every banker, broker, or other person not an authorized depositary of public moneys, who knowingly receives from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or who uses, transfers, converts, appropriates, or applies any portion of the public money for any purpose not prescribed by law, and every president, cashier, teller, director, or other officer of any

bank or banking association who violates any of the provisions of this section, is guilty of an act of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be punished as prescribed in section fifty-four hundred and eighty-eight."

This section is the counterpart of section 5488, which is the embezzlement section.

On this other ground also, the commitment to await surrender would be granted, provided all other conditions for extradition would have been complied with.

RECEIVING.

The extradition of the accused is lastly sought for the reason that they are accused of receiving from Carter money fraudulently obtained, to wit, the $575,749.90 paid over to them by Carter on July 6th, 1897, knowing the same to have been stolen.

This reason does not appear to have been set in the information and complaint as a special cause for asking the extradition of the accused. The charge, though, is made in substance, and the fraudulent payment by Carter of this money, and its acceptance by the accused, are mentioned as overt acts of the conspiracy. The supplementary information and complaint made in this case, after the judgment of the Privy Council, for a warrant to re-arrest the accused, contained a count for the fraudulent receiving of this money, which was mentioned in the new warrant of arrest, and at the argument Counsel for the prosecution declared that they were asking extradition on the ground of fraudulent receiving also. It is the practice in Canada for magistrates holding preliminary investigations, to commit for all the offences proven by the evidence adduced, whether these offences are mentioned in the information or not, and even for totally different offences, omitting that or those mentioned in the information.

There is no good reason why this should not be done in extradition cases, as the rules that govern the investigating magistrate, govern the extradition commissioner. The facts are to be found in the evidence, and in an extradition case the Judge hears the case in the same manner as nearly as may be, as if the fugitive was brought before a justice of the peace charged with an indictable offence committed in Canada. The Court of King's Bench has even found that this disposition of the Extradition Act gives power to admit to bail. (See Criminal Code, 578 and 596.)

The obtaining of the money by the accused through Carter was the crowning act of the corrupt combination existing between the accused and Carter. Accused knew as well as Carter that this money was not due to them by the United States, and that Carter, in passing it to them, was stealing from his employer, that according to the wording of the United States Statute he was "fraudulently applying the moneys of the United States to an object not prescribed by law," and consequently was embezzling (stealing) the same.

The act of receiving stolen property, knowing it to have been stolen, is punishable as a substantive offence by section 314 and 316 Criminal Code, 1892, and at common law the receiver can also be punished as participator in the theft.

We find in Archbold, 21st Edition, page 401, the following decision: " And where a third party receives goods from a servant, under colour of a pretended sale, knowing that the servant has no authority to sell them, and is, in fact, defrauding his master, this is larceny in both." Reg. v. Hornby, 1 C and K, p. 306.

The offence of receiving is also punished by the Imperial State 24 and 25 Vict., Chap. 96, Larceny Act, sec. 91.

In the United States it is punished by Section 2, Act of 1875, Supplement Revised Statutes United States, p. 89, which is in the following words:

" That if any person shall receive, conceal, or aid in concealing, or have, or retain in his possession with intent to

convert to his own use or gain, any money, property, record, voucher or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined from the United States, by any other person, knowing the same to have been so embezzled, stolen, or purloined, such person shall, on conviction before the Circuit or District Court of the United States, in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labour in the penitentiary not exceeding five years, one or both, at the discretion of the Court before which he shall be convicted.

"And such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen, or purloined."

Section 3 of the Treaty provides that extradition takes place for: "Embezzlement, larceny, receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen or fraudulently obtained."

On this ground of receiving stolen property, I am of opinion that extradition would be allowed, providing all other conditions for extradition had been fulfilled.

PREVIOUS REQUISITION UNNECESSARY.

Objection has been raised to the right of the prosecution to a commital for surrender for the reason that no complaints have been proven to have been made and no warrants issued in the demanding country for the arrest of the accused for the offences described in the complaint, and evidence before me. No authorities have been cited in support of this pretension.

Whether or not there is a warrant of arrest issued in the United States for the same offences that are under investigation is no concern of mine.

The Treaty and our Extradition Act, Section 6, do not require this pre-existing condition. The Privy Council has declared in its judgment in this case, that original prosecution could be instituted in the surrendering country, and there are many decisions upon this point contrary to the pretension of the defence. And for the Commissioner to have jurisdiction in an extradition matter it is not necessary that it be proved that a requisition for surrender has been previously made to the proper authorities. I have decided it myself in many cases, and lately in the Lorenz case, where the same objection was raised.

I see no good reason why I should change my opinion upon this point.

In re Hoke, 15 R.L., p. 99 Q.B. it was decided that it is not necessary in proceedings for a commital for extradition to prove a demand for the fugitive from the foreign government.

The same decision in re Garbut, 21 Ontario Reports 463; in re Caldwell, 5 Ont., P.R. 217; also in re Lazier, 3 Canadian Criminal Cases, p. 167; in re Burley, L.J., N.S., 34; and in re Worms, 7 R.L. 319, C.R. 1876.

It is proven that there are against the accused in the United States indictments for conspiracy with Carter to defraud the United States but this fact does not prevent the United States from demanding their extradition for other causes.

It was decided in ex parte DeBaum, M.L.R., 4 Q.B., 145, 1888, that "the fact that an indictment for embezzlement has been found against the accused in the State from which he fled, does not prevent a demand being for his surrender for forgery."

Section 19 of the Extradition Act gives to the demanding country two months after the decision on the writ of *habeas corpus* if one has been granted, to take steps to have the fugitive surrendered and conveyed out of Canada. That this is so was declared by Chief Justice Dorion in the Hoke case, 15 R.L. 105.

In the Lorenz case, just referred to, the requisition for surrender was only made after commital, and it was found to have been made in due time, since surrender was ordered.

I think there is nothing in this objection.

OBJECTION TO THE ADMISSIBILITY OF FOREIGN EVIDENCE.

A more serious objection raised by the defence is the one relating to the legality of the written evidence put before me by the prosecution.

Section 10 of the Extradition Act states: "10.—Depositions taken out of Canada— When to be deemed authenticated:

Depositions or statements taken in a foreign state on oath, or on affirmation, where affirmation is allowed by the law of the state, and copies of such depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction may, if duly authenticated, be received in evidence in proceedings under this Act: 2.—Such papers shall be deemed duly authenticated if authenticated in manner provided, for the time being by-law, or if authenticated as follows:

(*a*) If the warrant purports to be signed by or the certificate purports to be certified by or the depositions or statements, or the copies thereof, purport to be certified to be the originals or true copies, by a judge, magistrate, or officer of the foreign state;

(*b*) And if the papers are authenticated by the oath or affirmation of some witness, or by being sealed with the official seal of the Minister of Justice, or some minister of the foreign state, or of a colony, dependency, or constituent part of the foreign state; of which seal the judge shall take judicial notice without proof."

The defence contends that the documents and papers filed by the prosecution as foreign evidence are not copies of depositions or statements on oath, they not being legally depositions or statements on oath in the United States, be-

cause the originals of these so called depositions or statements were not read over to the witnesses nor signed by them. It seems to me that I have not to enquire whether the originals are or are not depositions or statements on oath in the United States, so as to be taken cognizance of and be given legal effect to by the tribunals of the United States, but whether the documents filed as copies of depositions or statements on oath are such as to be received in Canada for the purposes of this investigation. If ever they are offered to be used as depositions in the United States, then I suppose, it will be time for the competent authority to enquire whether it can be legally done or not.

The originals of these depositions appear to have been taken by shorthand, in a regular judicial proceeding had before United States Commissioner Shields, for the removal of accused to Georgia, in the presence of the accused, who were represented by two of the leading members of the New York Bar, and who cross-examined the witness, and who made no objection whatever to the manner in which the depositions were taken. This is exactly the manner in which depositions are legally taken in preliminary investigations here, and even in the present case the depositions taken before me were taken in this manner, without objection on the part of the accused. The stenographer who took the notes of the foreign evidence swore that his transcript of these notes was correct, and Commissioner Shields, an officer qualified to administer oaths and examine witnesses, certifies that the documents filed are true copies of these depositions.

The taking of evidence in extradition cases by shorthand has been recognized as legal. In re Garbut 21 Ont. Reports, 179, 182, 183.

Neither the Treaty nor the Extradition Act requires, though, that these depositions or statements be taken according to the requirements of special statutes of the foreign countries, so as to be given legal effect before the courts of justice of the foreign country. They are not intended to be used before the courts of justice of a foreign country, and it would not be reasonable to exact the conditions that would

make them legal before these courts of justice of the United States, which would be unnecessary. The only condition imposed by section 10 for depositions or statements taken in a foreign country is that they be taken on oath, and duly authenticated, which has been done here.

For their admissibility it is the law of the country where these depositions or statements are offered that is to be followed. See The New International Encyclopedia, Vol. 5, page 822, on this question under the word "Deposition" as follows:—

"Deposition.—The testimony of a witness legally taken and committed to writing, by, or in the presence of a judge, referee, commissioner, notary public, or other duly qualified official person. It is usually taken by virtue of a commission, or letters rogatory (q.v.) issuing out of the court in which the action is pending, or which has jurisdiction of the subject matter, if taken before trial.

The questions may be asked orally or may be submitted to the witness in the form of written interrogatories. The legal representatives of all parties to the action or proceeding are entitled to be present, and to cross-examine the witness, or submit cross-interrogatories to be answered. If the competency of the witnesses or the admissibility of the questions or answers is objected to, the objection must be stated to the court or officer taking the deposition, and he may either rule on the question at once, noting the objection, ruling and exception, or reserve it for the opinion of the court from which the commission issued.

The laws of the State having jurisdiction of the litigation in which the evidence is to be used regulate the manner of taking the testimony, irrespective of the jurisdiction where it is taken. The competency and admissibility of the testimony are determined by the rules of evidence in force where it is offered in court. Depositions are used in courts, and they may be ordered taken where witnesses are out of the jurisdiction, or, if within the State, if they are very old and infirm or in feeble health, in order to perpetuate their testi-

mony in case of death before the trial. They cannot be used, however, where the witness himself can be produced. See Evidences; Testimony; Letters Rogatory."

The reasons advanced by Mr. Rose against the admissibility of these depositions or statements on oath are, that the originals were not read over to the witnesses and signed by them. Mr. Erwin, though, swears that the witnesses did read over their depositions, except one, who may not have read over all of his cross-examination by counsel for accused. Besides being taken in a manner recognized by our law, the presumption nevertheless, is, that the originals are depositions in the United States because they have been taken in a regular judicial proceeding, had before a competent officer without objection on the part of the accused, and have even been accepted and acted upon by the defendants in a proceeding in a court of justice in New York presided over by Judge Brown.

Unless section 10 of the Extradition Act would evidently declare that foreign evidence must be taken according to the law of the demanding country, I must hold that this is not required, and that for the admissibility of evidence, I must be governed by the Canadian law, and according to our law, the papers filed are copies of depositions on oath, and can be received although taken in the foreign country, because section 10 permits it.

The witnesses having testified in the presence of the accused, and having been cross-examined by them in a regular judicial proceeding the papers that are filed before me must be termed copies of depositions, as distinguished from affidavits or statements on oath.

"An affidavit is simply a declaration on oath in writing, sworn before an officer authorized to administer an oath. Its validity does not depend on the fact whether it is entitled in any cause or in any particular way." Abbot's Law Dictionary.

"An affidavit is a statement or declaration reduced to writing and sworn or affirmed to before some officer who has

authority to administer an oath or affirmation..... the deponent must sign the affidavit at the end. In the absence of a rule of court or statute requiring it, if affiant's name appears in an affidavit as the person who took the oath, the subscription to it by affiant is not necessary." Bouvier's Law Dictionary.

"An affidavit is a voluntary declaration made in writing made before competent authority." Standard Dictionary.

"A deposition is testimony legally taken on interrogatories and reduced to writing for use as evidence in court." Standard Dictionary.

"A statement is a formal narration of facts fyled as the foundation for judicial proceedings." Standard Dictionary.

"An affidavit is a formal written or printed voluntary ex parte statement sworn to before an officer authorized to receive it. It differs from a deposition in this, that in the latter, the opposite party has an opportunity to cross-examine the witnesses, whereas an affidavit is always taken ex parte." Bouvier's Law Dictionary.

"An affidavit is simply a declaration on oath in writing sworn to before some person who has authority under the law to administer the oath." Harris vs. Lester, 80 Illinois 307.

In re Watts vs. Womack, 44 Ala. 605, it was held, that it was not essential to an affidavit that the name of the affiant should be subscribed. An affidavit is a sworn stateemnt in writing.

It is evident by all the definitions cited above that the signature of an affiant in an affidavit is not required as an essential part. The signature is only for the object of identifying the affidavit, and if the name of the affiant is written in the affidavit by the person administering the oath, and certifying to it as being the person giving the affidavit, it is then properly identified.

Mr. Rose, one of the legal experts of the accused, said in his deposition: "A deposition unsigned, or an affidavit un-

signed would be, in my opinion, so more a deposition or an affidavit than a cheque unsigned."

This opinion of Mr. Rose is contradicted by the definitions and decisions above referred to. Besides, Mr. Frank Lloyd, Assistant U. S. District Attorney for the Southern District of New York, testified to the contrary view, and this opinion is supported by the following authorities:

Jackson v. Virgil, 3 Johnson Rep. 540, 1809.

People v. Campbell, 88 Hun. 547 (1895).

People v. Kenyon, 16 Hun. 195 (1878).

The only authority cited by the defence to support their pretension was the case of Hoke 14 R.L., p. 795, but I do not think they can derive any benefit from it. The same question was not at issue as appears by the remarks of Hon. Mr. Justice Dugas, the learned Judge who decided it. One of the objections raised in that case to the admissibility of the foreign evidence was, that the depositions taken in the foreign state did not show that the witnesses had been sworn before making their statement, and to support this pretension the defence did not rely on any foreign statute, but they cited the Canadian statute, Sec. 30 of Chapter 30, 32-33 Vict., which requires the Justice to administer the oath to a witness before he is examined. The decision of the learned Judge was that the extradition law did not exact this condition, and the depositions were admitted because they were on their face, statements on oath and duly authenticated.

See Worms 22 Lower Canada Jurist, p. 109.

Counhaye, Law Reports 8 Q.B., p. 410.

Although I have not to apply the foreign law on this question of the admissibility of the foreign evidence, even supposing the pretension of the defence be well founded, the evidence on this point is conflicting, and according to the rules of evidence in preliminary investigations, the defence could gain nothing by their objection, and if it was granted that the documents fyled are not copies of depositions, which I do not admit, these documents are at least

statements on oath, coming within the definition cited above, and would be sufficient as such.

In the case of Worms already cited, the late Chief Justice Dorion, relying exclusively on the Canadian extradition law, decided that depositions taken before another magistrate than the one having issued the warrant, were admissible when duly certified, because they came within the terms of the extradition act, and he added that "depositions or statements on oath are synonymous terms, and the depositions in this case are to be received as statements on cath, even if they were not as depositions."

See Dubois alias Coppin 12 Juris N. S. 867.

Parker 19 Ont. Rep. 612 and 616.

Counhaye (1873) L.R. 8 Q.B. 410.

The same doctrine exists in the U. S.

See Moore on Extradition, p. 525, and Thompson vs. Brooks, 3 Blatchford, U. S. 456, where it is declared that the Supreme Court in its rules uses the terms depositions and affidavits as convertible expressions.

At the hearing, witnesses have been examined in order to determine, according to the law of the United States the date that the accused become fugitives from justice. This evidence could only have been adduced with the view, I presume, to show that the crimes investigated by me would come under some statute limiting criminal prosecution. The evidence of the legal experts upon this matter is conflicting and the authorities cited seem to be in support of the pretension of the prosecution, that the accused have been fugitives from the justice of the United States to all intents and purposes since December 1899, which is the time that indictments were laid against them in Georgia for conspiracy to defraud and presenting false and fraudulent claims, and that they were arrested in New York, and proceedings instituted for their removal to Georgia to there answer to these charges and all other charges that might be there preferred against them. The authorities cited were Streep v. U. S. 160 U. S.; Howgate v. U. S., 24 Washington Law Reporter

205 to 224; Roberts and Reilly, 116 U. S.; U. S. vs. White, Cranch, U. S. C. C. Report, 38 and 73.

Whatever might be the bearing of these authorities upon this point, and whatever doubt might be left I do not think that the issue is raised in this case, because the cardinal condition to raise it is missing, namely, the proof of the existence of a limitation statute, and of the terms of it actually affecting the crimes under examination. It is true that the authorities cited refer to some limitation statutes affecting the crimes then tried, which were different from those tried at present, but I cannot presume from these references that there is a limitation statute affecting the present crimes, and go and pick it out in our library, if it is there, and study every clause of it, in order to find out whether there is any disposition affecting the crimes with which the accused are presently charged, and interpret it from my own knowledge, without the very dispositions affecting these crimes ,if any exist, being formally proved and put in the record. At any rate, if a doubt would exist upon the matter of the accused being fugitives from justice from December 1899 or from March 1902 which is the date they came into Canada, I think the question is one for the trial court in Georgia to determine. (See U. S. vs Cooke 17 Wall U. S. Supreme Court, 168). However, this point seems to have been abandoned, for at the argument had after the closing of the evidence, Counsel for the defence did not mention it.

The defence has advanced the pretension that for the definition of extradition crimes, recourse should be had to the English law and not to the Canadian law. No precedent, however, has been cited upon this point, and I do not think it has been seriously urged. However, the letter and spirit of the Extradition Act are contrary to this pretension, also the universal jurisprudence.

Sub-section B of section 2 of our Extradition Act, Chapter 142 Revised Statutes, states:

(*b*) The expression "extradition crime" may mean any crime which, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in the

first schedule to this Act,—and, in the application of this Act to the case of any extradition arrangement, means any crime described in such arrangement, whether comprised in the said schedule or not.

Section 24 of the same Act, says:

"The list of crimes in the first schedule to this Act shall be construed according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act, and as including only such crimes, of the descriptions comprised in the list as are, under that law, indictable offences."

Section 11 of the said Act states:

11.—"If, in the case of a fugitive alleged to have been convicted of an extradition crime, such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, prove that he was so convicted,— and if, in the case of a fugitive accused of an extradition crime, such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, justify his committal for trial, if the crime had been committed in Canada, the judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state, or discharged according to law; but otherwise the judge shall order him to be discharged."

These citations of the Act dispose, I think, of this last objection of the defence. Besides, it has been held in *ex parts,* Lamarande, 10 L.C.J., p. 280; *ex parte* Worms, 22 L.C.J., 109; in *re* T. B. Smith, 4 U.C.P.R. 215, that the acts alleged must constitute an offence under Canadian law.

Ex part Seitz (Vol. 3), Can. Crim. Cas., p. 127.

The same views are held in the United States, where it is held that the offence must be one against the law of the United States. See *re* Farez 7 Blatchford, 357; *re* Wadge,

15 Federal Rep. 664; *re* Charleston, 34 Federal Report, 531.

Moore on Extradition, says, page 525: "It has been held that the rule that the evidence must be such as to justify commitment for trial at the place where the fugitive is found, if the offence had there been committed, applies not only to the admissibility and the amount of the evidence required for that purpose in the particular place, but also to the definition of the offence."

The opinion of Sir Edward Clarke upon the duties of the extradition commissioner as to committal or discharge might perhaps be cited with advantage, not that I have any doubts as to the course that I have to follow, but to show how the path of the Extradition Commissioner is narrow. And this also answers the contention of the learned counsel for the defence that the accused were entitled to the benefit of any reasonable doubt, if any existed.

Clarke, on Extradition, p. 247:—"It must be remembered that the Magistrate investigating a case of demanded extradition is not quite in the same position as if he were deciding on a charge of crime committed within his own jurisdiction. In the latter case he has full discretion, he may, and often does, discharge a prisoner because, although there is *prima facie* evidence of guilt, the circumstances are so obscure, the intent so doubtful, the testimony so conflicting, that he thinks a jury would not be likely to convict. But in a case of extradition he cannot consider these matters. If he finds sufficient evidence of guilt to justify a committment, the question of a probability of a conviction is not one for his consideration."

See *ex parte* Feinberg, Can. Crim. Cas., Vol. 4, p. 270 (Wurtele, J.).

On the whole, my conclusion is that the allegation of the conspiracy to defraud the United States as being in existence between Carter and the accused, on or about July 1st, 1897, is proven to the hilt; that Carter, a public officer and agent and trustee of the United States, was guilty and

convicted in the United States of fraud, as declared by the United States Supreme Court in the case of Carter *vs.* McClaughry; that this offence of fraud and participation therein are punishable by the laws of both Canada and the demanding country; that the accused have participated in the offence of fraud committed by Carter, for which he was so convicted; that fraud by an agent and trustee and participation therein are extraditable crimes.

2nd.—That Carter was guilty in the United States and was convicted of embezzlement, which offence is known under our law by the term of theft, the difference in the name of the offence in the two countries being immaterial; that the accused have participated by their conspiracy with Carter in the embezzlement (theft) so committed by him; that such participation is punishable by the laws of both countries, and is an extradition crime.

3rd.—That on July 6th, 1897, the accused have fraudulently received from Carter the sum of $575,749.90, knowing then that the same had been embezzled (stolen) by him, and that the offence of receiving stolen property is punishable under the laws of both countries, and is by the Treaty, Section 3, an extradition crime.

Consequently, I determine that the accused must be committed to gaol pending surrender.

The FORMAL COMMITTAL is as follows:

Canada,
Province of Quebec,
District of Montreal.

The Extradition Act.

OFFICE OF THE COMMISSIONER.

To all or any of the Constables and other Peace Officers in the said District of Montreal, and to the Keeper of the common Jail at Montreal;

Be it remembered that on this sixth day of June in the year of Our Lord one thousand nine-hundred and five at the said City of Montreal, Benjamin D. Greene and John F.

Gaynor brought before me, Ulric Lafontaine Esquire, a Commissioner duly appointed under the Great Seal of Canada, to act judicially in extradition cases, within the Province of Quebec under "The Extradition Act", who have been apprehended under the said Act, to be dealt with according to law; and for as much as I have determined that they should be surrendered in pursuance of the said Act, on the ground that they are accused of the following extradition crimes that is to say for, that the said Benjamin D. Greene and John F. Gaynor:

1. Did on or about July 1st 1897, within the Eastern Division of the Southern District of Georgia, in the United States of America, participate in fraud then and there committed by Oberlin M. Carter, a disbursing officer, agent, and trustee, in the employment of the Government of the United States:—

(*a*) By entering into a corrupt agreement (conspiracy) with the said Oberlin M. Carter, the said officer and agent of the United States, to defraud the United States in the disharge of the duties of his said office and employment, and for the payment by him, as such disbursing officer and agent of the United States, out of the public moneys of the United States entrusted and to be entrusted to him as such disbursing officer and agent, of fraudulent claims made and to be made against the United States for the benefit of said conspirators and to be presented to said disbursing officer for his approval and payment: by which corrupt agreement and deceitful device the said officer and agent transferred the exercise of the discretions of his office, and the services of his employment, which he was in duty bound as such officer and agent to render honestly and faithfully, to and in favour of the United States, from the United States, his principal and employer, to the said Benjamin D. Greene, John F. Gaynor and others, so that the said United States, by said corrupt agreement itself,

lost what it was entitled to have, the honest and faithful services of its said public officer and agent, to its injury.

(*b*) By jointly with said Oberlin M. Carter, the officer, agent and trustee, of the United States, causing to be made and presented to said Carter as such officer, and agent, fraudulent claims against the Government of the United States for his approval and payment, to the amount of $575,749.90 knowing the same to be fraudulent.

2. And did, on or about July 6th, 1897, within the Eastern Division of the Southern District of Georgia, in the United States of America, participate in the embezzlement then and there committed by Oberlin M. Carter, a disbursing officer, agent and trustee, in the employment of the Government of the United States, of the sum of $575,749.90 of the public moneys of the United States, then and there entrusted to said Oberlin M. Carter as such officer and agent:—

(*a*) By soliciting, counselling, moving, aiding and procuring said Oberlin M. Carter, the officer, agent and trustee entrusted with said public money of the United States, knowingly to apply the same to a purpose not prescribed by law, to wit, to the payment of fraudulent claims against the Government of the United States, to the amount of $575,749.90;

(*b*) By knowingly having applied the said sum of $575,749.90 of the public moneys of the said United States, received by them from said Oberlin M. Carter, as such officer, agent and trustee, knowing the same to have been fraudulently obtained and fraudulently paid out by said Carter as such disbursing officer, agent and trustee, to the payment of fraudulent claims against the Government of the United States, to the amount of $575,749.90 by them caused to be presented to said

Oberlin M. Carter for approval and payment by him, as such officer agent and trustee, that being an application of said money for a purpose not prescribed by law.

3. And did on or about July 6th, 1897, knowingly and unlawfully receive from Oberlin M. Carter, the sum of $575,749.90 of the moneys and property of the United States, knowing the same to have been fraudulently obtained by said Oberlin M. Carter, and did thereafter have in their possession said money and property, or a part thereof, within the said Eastern Division of the Southern District of Georgia, knowing the same to have been fraudulently obtained as aforesaid.

As will more fully appear from the complaint fyled and the evidence adduced in this proceeding on the part of the prosecution:—

All of which crimes, and participation therein, are punishable by the laws of the United Kingdom of Great Britain and Ireland, of the Dominion of Canada, and of the United States, and are Extradition crimes.

THIS IS THEREFORE TO COMMAND YOU the said Constables, in His Majesty's name, forthwith to convey and deliver the said Benjamin D. Greene and John F. Gaynor into the Custody of the Keeper of the said Jail, at Montreal, and you, the said Keeper, to receive the said Benjamin D. Greene and John F. Gaynor into your custody, and them there safely to keep until they are thence delivered pursuant to the provisions of the said Act for which this shall be your warrant.

Given under my hand and seal at the City of Montreal this sixth day of June A.D. 1905.

(Signed) ULRIC LAFONTAINE,

Extradition Commissioner.

Mr. Commissioner Lafontaine, addressing the accused, then said:

It is my duty to inform you that you will not be surrendered until after the expiration of fifteen days, and that you have the right to apply for a writ of *Habeas Corpus*.

The goaler thereupon conveyed the prisoners to the common gaol, there to await the final order upon the committal for surrender.

II.

PRIVY COUNCIL JUDGMENT.

The London Times Report.

The report of the judgment of the Judicial Committee of the Privy Council, on the appeal of the United States in the case of Gaynor and Greene, as contained in "The Times," London, Thursday, February 9th, 1905, corrected from the official blue-print of the judgment, is as follows:—

THE UNITED STATES OF AMERICA *v.* GAYNOR AND ANOTHER.

This was an appeal from judgments of Mr. Justice Caron, one of the Judges of the Superior Court of Lower Canada, of August 13, 1902.

Sir Edward Clarke, K.C., Mr. Donald Macmaster, K.C. (of the Canadian Bar), and Mr. E. Percival Clarke appeared for the American Government; Mr. Asquith, K.C., Mr. Horace Avory, K.C., Mr. L. A. Taschereau, K.C. (of the Canadian Bar), and Mr. Charles Matthews for the respondents.

The arguments were heard in December before a Board composed of the Lord Chancellor, Lord Macnaghten, Lord Robertson, Lord Lindley, Sir Ford North and Sir Arthur Wilson, when judgment was reversed. (*Vide, The Times,* December 17 and 19.)

The Lord Chancellor now delivered their Lordships' judgment. He said: "This is an appeal from judgments of Mr. Justice Caron, one of the Judges of the Superior Court for Lower Canada, dated August 13, 1902, dismissing motions made on behalf of the United States of America on July 9, 1902, to quash writs of *habeas corpus* granted by the said learned Judge to the respondents on the 21st June, 1902,

and ordering their liberation. The facts, which are not really in dispute, appear to be that the two respondents, Gaynor and Greene, had been in the employment of the Government of the United States of America, and have been charged with certain criminal offences in respect of certain transactions in the State of Georgia. While they were in Quebec, application was made to an officer called an Extradition Commissioner for their arrest in pursuance of the international extradition arrangements between Canada and the United States of America.

The application was made upon an information which (among other things) alleged that the respondents had been guilty of theft, and the Commissioner, Mr. Ulric Lafontaine, duly issued his warrant for the arrest of the alleged criminals. They were accordingly arrested, and upon their arrest, they applied to a learned Judge, Mr. Justice Andrews, for a writ of *habeas corpus*.

Now the only question which the learned Judge had to determine was whether the accused were at the time of the issue of the writ in question in lawful custody. If they were, he had no jurisdiction to release them, but was bound to remand them to custody, and, up to this point, it is difficult to see what ground could be even suggested for their release.

The offence of theft was an offence which made the offender liable to extradition.

The Commissioner was invested by the Extradition Act with all the powers of a Judge in that behalf, and under the Commissioner's warrant the officer having the custody of the accused was to receive and keep them till a particular date (the 27th of May, 1902), and then bring them before the Commissioner to be further dealt with according to law (R.S.C., c. 142).

It is difficult to understand what is the supposed unlawfulness of the custody, and it is only upon the supposed unlawfulness of the custody that any application for discharge could be founded.

It was probably owing to some mistake as to the jurisdiction of the Commissioner that any writ was issued. At all events, when the facts were placed before Mr. Justice Andrews, and the prisoners were brought before him under his order, the learned Judge did what was obviously right. He remanded them to their lawful custody from which they never ought to have been removed, and expressed himself thus:—"I consider that I am in possession of these accused "in virtue of my order, having taken them from the gaoler "in the district of Montreal, in whose lawful custody I now "return them. I consider I have no right whatsoever to "do anything which might in the most remote degree defeat "the obligation under which I feel I am, and I may say, "and I do say, that I feel that the Province is under, that "these men should go back to the place from which I took "them. If I took them by mistake from there, if I took "them without jurisdiction, that is no reason why they "should escape here, and it seems to me that it was not for "the persons who induced me to commit this act to now "endeavour to avail themselves of it in order to effect their "escape. I consider it my duty to say this, and I now say "that, sitting as a Judge, having issued a writ of *habeas* "*corpus*, I do not recognize, but I distinctly deny, the right "of any other Judge to interfere in the matter until the "men have passed from my hands. When I have given "my order in the premises I have washed my hands of "responsibility in the matter, and then, and not till then, "it is my firm conviction, that no other Judge has the "power to interfere with them. I say this, of course, not "because I desire to say it in respect of any other Judge, "but I think I am bound to say it to the sheriff, who is now "present.

"So that there may be no mistake in the matter "I have drawn up my judgment in writing, and it is this:— "I, the undersigned Judge, having heard the petitioner by "his counsel, he, the said petitioner, being now present before "me, in the custody of the sheriff of this district, also pre- "sent before me, I do hereby order the said sheriff forthwith

" to convey the said petitioner, John Francis Gaynor, to " the common gaol of the district of Montreal, and " there to deliver the said John Francis Gaynor " into the custody of the keeper of the said com- " mon gaol in Montreal, who is hereby ordered to receive the " said John Francis Gaynor into his custody, and to safely " keep him until duly discharged in due course of law, " according to the terms and exigencies of the warrant, under " which the said gaoler, has returned on the writ of *habeas* " *corpus* to him directed by me that he detains him, to wit, " the warrant under the hand and seal of Ulric Lafontaine, " Esq., Extradition Commissioner, issued and dated at the " said City of Monreal, on the nineteenth day of May, in the " second year of his Majesty's reign, and in the year of Our " Lord, one thousand nine hundred and two. Thus adjudged " and ordered by me at the City of Quebec the twenty-first " day of June in the said year one thousand nine hundred " and two. Frederick W. Andrews, Judge, Superior Court, " Quebec."

Their Lordships are of opinion that Mr. Justice Andrews was quite accurate in what he then did. There had been a regular and proper application to the Extradition Commissioner, who, after receiving evidence to indentify the persons charged, had appointed a day for the regular procedure in extradition and had in the meantime committed the accused to the proper custody by way of remand.

Mr. Justice Andrews was apparently not informed of this, and he issued the writ of *habeas corpus,* but (as will be pointed out hereafter) the writ, if issued, could have no other return that the cause of detention was a lawful remand by a Commissioner having jurisdiction over the subject-matter of the inquiry.

When the learned Judge found out the mistake that had been made, he at once proceeded to put it right, and then the somewhat extraordinary intervention of Mr. Justice Caron took place, which has given rise to this appeal. Notwithstanding the judgment of Mr. Justice Andrews before him, who had justly pointed out that the matter stood for adjudica-

tion before him, the learned Judge issued a writ of *habeas corpus* returnable before himself, and ultimately discharged the accused from custody upon grounds which their Lordships have some difficulty in following.

Mr. Justice Caron first gets rid of the adjudication by Mr. Justice Andrews by a singular misapprehension of that learned Judge's language. Mr. Justice Andrews undoubtedly did decide the question before him, which was whether Mr. Commissioner Lafontaine's order showed a sufficient cause of detention, and he decided that it did.

Mr. Justice Andrews gave his reasons, and these Mr. Justice Caron confuses with the adjudication. The adjudication was (*a*) the determination that the imprisonment was lawful, and (*b*) the endorsement on the writs that they were quashed. That is, in point of law, the judgment, and, though it is common enough to speak of a learned Judge's judgment in referring to the reasons by which that judgment is supported, it is somewhat singular to find a learned Judge himself confusing the two things.

The substance of Mr. Justice Caron's determination appears to have been that no offence within the meaning of the Extradition Act was shown upon the document that had been brought before him by a writ of *certiorari*. Their Lordships are wholly unable to agree with him. There was an accusation of theft, which is an offence in both countries, but the learned Judge does not appear to have apprehended that an accusation, on information, of theft was enough for the claim to arrest and detain. Whether the accusation was well founded or whether there was enough to justify the Extradition Commissioner in committing for surrender was a question which would have been regularly brought before him and determined at the proper time if the due course of justice had not been interfered with by the interposition of the learned Judge. The learned Judge accurately points out that a conspiracy is not an offence within the treaty, and because an indictment for conspiracy has been framed in which acts of larceny are charged as overt acts of the conspiracy the learned Judge seems to think that the United States Govern-

ment are stopped from treating them as distinct and inde pendent acts of larceny. The whole matter, and, *inter alia*, how much evidence there was of larceny, would have been duly and properly investigated if the case had been allowed to take its proper course. Their Lordships do not mean to suggest that the writ of *habeas corpus* is not applicable when there is a preliminary proceeding. Each case must depend upon its own merits. But where a prisoner is brought before a competent tribunal, and is charged with an extradition offence, and remanded for the express purpose of affording the prosecution the opportunity of bringing forward the evidence by which that accusation is to be supported; if, in such a case, upon a writ of *habeas corpus*, a learned Judge treats the remand warrant as a nullity, and proceeds to adjudicate upon the case as though the whole evidence were before him, it would paralyse the administration of justice and render it impossible for the proceedings in extradition to be effective.

The proceedings are very simple: information and arrest; then — either at once or on remand — the Judge investigates the case, and either discharges or makes up his mind to commit for extradition, and, if he does the latter, he has to inform the accused person that he will not be surrendered for 15 days, in order to afford him an opportunity of bringing the legality of his surrender before a Court of Justice. The same facts and the same observations apply to the case of the other respondent, Greene. Their Lordship will accordingly humbly advise his Majesty that the two judgments of Mr. Justice Caron of the 13th August, 1902, ought to be reversed.

" The respondents must pay the costs of this appeal."

III.

THE JUDGMENT OF THE COURT OF KING'S BENCH FOR LOWER CANADA.

(Appeal Side.)

This judgment dismissed the appeal of the fugitives and confirmed the judgment of the Honourable Mr. Justice Davidson of the Superior Court for Lower Canada, refusing their application for a Writ of Prohibition to restrain Judge Lafontaine from proceeding with the enquiry upon the ground that he was acting in excess of his jurisdiction.

This judgment was delivered by the Court of King's Bench, which is the highest Court of Appeal in the Province of Quebec, composed of the Honourable Sir Alexander Lacoste, Chief Justice, the Honourable Justices Bossé, Blanchet, Hall, and Trenholme, on the 19th day of May, 1905. The judgment was unanimous. (Montreal Gazette Report.)

Sir Alex. Lacoste, C.J., delivering judgment, said:—

The appellants have been arrested for certain offences committed in the United States. The American Government asks for their extradition. They are actually on trial, at Montreal, before Mr. Lafontaine, commissioner in extradition, appointed by the Federal Government.

The appellants declined the jurisdiction of the commissioner, and on the latter's refusal to desist, they asked the Hon. Mr. Justice Davidson, one of the judges of the Superior Court, authorization to take out a writ of prohibition (C.P., 1003-993). The judge refused to grant it; and it is from that decision that Gaynor and Greene have appealed.

They take exception to the jurisdiction of Mr. Lafontaine, because he holds his commission from the Federal Government, which, according to them, had no power to appoint extradition commissioners.

The respondents pleaded:—

1. That no appeal lay from the judge's decision.

2. That the writ of prohibition was not available in the present instance.

3. That the commissioner's appointment is valid.

As an additional ground the appellants argued that it is the Imperial Extradition Act (33-34 Vict., chap. 52), which governs us, and that, under that act, police magistrates alone have the right to try extradition matters.

Does an appeal lie from Mr. Justice Davidson?

Art. 1006, C.P., grants an appeal from the final judgment, on a writ of prohibition. This includes an appeal from the decisions rendered by a judge in chambers. (C.P., art. 72.)

The respondents have argued that this court cannot authorize the issue of the writ, because that power is given to a judge of the Superior Court exclusively.

In granting an appeal, the law intends that the judgment of the Court of Appeal should be effective, and that the court may apply the remedy the appellant asks for. That is the reason why it authorizes us to substitute ourselves for the judge who has rendered the decision.

We hold that the appeal lies. Consult on this first point: Ch. de Fer de la Vallée Est du Richelieu and Menard, R.J.Q., 7 Q.B. 486; Gain vs. Bartels, 1 Q.P.R. 531; Lachance vs Paroisse de Ste. Anne, R.J.Q., 10 K.B. 223.

Does the writ of prohibition lie?

The respondents say that the proper remedy is a *quo warranto,* because, if Mr. Lafontaine is not legally appointed a commissioner, he has usurped a public office, and his right to it can be attacked only by way of *quo warranto.* (C.P., art. 987.)

And the respondents further argue, that, in any event, the writ of prohibition, like the writ of *mandamus* (C.P., 1003), lies only in the case where there is no other remedy equally convenient, beneficial, and effectual (C.P., 992), and that,

under the Extradition Act, the appellants have a recourse by way of *habeas corpus* (Extradition Act).

We do not see any necessity for determining these two objections. We prefer to take the position assumed by the appellants in their argument before us, and decide the second point on the interpretation and bearing which we give to art. 1003.

They say, the commissioner, when sitting, constitutes a court, a tribunal, which proceeds without jurisdiction, and the Superior Court, in virtue of its general power of supervision and control (C.P. 50), as well as in virtue of the special power conferred upon it by art. 1003 C.P., can prevent all inferior tribunals from proceeding without jurisdiction.

Assuming that the commissioner presides in a court, whenever he sits, that court is not an inferior tribunal.

It is true that the Superior Court has a right of supervision and control over all the courts of the province (C.P., art. 50), but that power does not include the control of a federal court, such as this one. The Commissioner in Extradition has powers equal to those of the judges of the Superior Courts, and the art. 1003 C.P., is not applicable to it.

But the appellants call in question the right of the Federal Government to establish such courts. That is the gist of the following question, which we shall now answer:

Is the appointment of Mr. Lafontaine a valid one?

Section 132 of the British North America Act says:

"The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof as part of the British Empire towards foreign countries, arising under treaties between the Empire and such foreign countries."

And section 101:

"The Parliament of Canada may, notwithstanding anything in the act, from time to time, provide for the constitution, maintenance, and organization of a general court of appeal for Canada," and for the establishment of any addi-

tional courts for the better administration of the laws of Canada."

From these enactments it appears that the Parliament and the Government of Canada have jurisdiction in extradition matters, and that the Parliament of Canada, may create a special court to try extradition cases. That is what it did when it passed the Extradition Act (R.S.C., cap. 142) and appointed as extradition commissioners the judges of the Superior Courts and "such other persons as might be named by the Governor-in-Council."

The appellants argue that by "additional courts" are necessarily meant other courts of appeal or courts of the same nature as the Court of Appeal. That is an unreasonable distortion and restriction of the text. The act has in view courts of original jurisdiction and courts of appeal. It is in virtue of that section that the Exchequer Court was created, that jurisdiction has been given to certain courts in matters of contestation of federal elections, and that the Railway Commission was constituted.

The appellants call upon us to reconcile foregoing clauses with sections 91 and 92, which give the federal Government (91, sub. 27):

"The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

And to the local Government (91, sub. 14):

"The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts."

There is no contradiction in the two clauses. The provincial courts do not exclude the federal courts with regard to the administration of federal laws. And if there were a contradiction, we should have to prefer section 101 on account of these words in it: "notwithstanding anything to the contrary in this act." The provincial jurisdiction of the provincial courts in criminal matters extends only to offenses committed within the province.

Art. 2447, R.S.Q., defines the jurisdiction of the Court of King's Bench as follows:

"The Court of King' Bench, Crown side, and the judges thereof, have criminal jurisdiction throughout the province over all crimes and misdemeanors committed within its limits," which does not include offences committed abroad.

It was, therefore, necessary that the Parliament of Canada should create a special court, or should appoint persons to apply the extradition laws.

Therefore, we believe that Mr. Lafontaine was legally appointed extradition commissioner.

A final objection has been raised, as I have said before:

The Imperial Extradition Act (33-43, Vict., Cap. 52), orders extradition proceedings to be carried on before a police magistrate (Sect. 8), that this shall apply to all British possessions (Sect. 16 to 26), but its effect can be suspended in a colony by an order of the King-in-Council, when that colony, has, by statute, provided for the putting into effect of the Imperial Extradition Treaties. Canada passed such a statute in 1886, (it now forms chap. 142 of the Revised Statutes of Canada). The Imperial Government then passed an order-in-Council on the 17th November, 1888, (R. S. C., 1888, p. 15), in the following terms:

"The operation of the extradition acts of 1870 and 1878 shall be suspended within the Dominion of Canada, so long as the provisions of the said act of the Parliament of Canada of 1886, entitled, "An act respecting the extradition of fugitive criminals," shall continue in force and no longer."

Subsequently to this order-in-Council the Canadian Parliament in 1889 (52, Vict. C. 36), amended the Extradition Act of 1886. The order-in-Council of 1888 has, in conecquence, say the appellants, "become ineffective, the Imperial Act is once more applicable to Canada, and a police magistrate alone has jurisdiction, under the Imperial Act, to try cases in extradition."

The act of 1889 does not repeal that of 1886 that is to say, Cap. 142, of R. S. C. It affects none of the latter's dispositions, it applies only to the fugitives from such coun-

tries as have no extradition treaties with Great Britain, or to crimes not covered by the treaties signed by Great Britain, and certain foreign countries. All the provisions of R. S. C., 142, are still in force, and we are still governed by the order-in-Council of 1888.

Since the act of 1889, Great Britain and the United States have twice modified their extradition treaty; for the first time, the 12th July, 1889, and again in 1902, and each time the order-in-Council has been renewed (Statutes of Canada, 1890, pp. XLII.-XLVI.—Statutes of Canada, 1902, pp. XV.-XVII). The new orders-in-Council are a peremptory answer to the objection raised by the appellants.

We are, therefore, of opinion that His Lordship, Judge Davidson has rendered a proper judgment.

Our attention is persistently drawn to the fact that the authorization asked for is merely to institute an action and that the question raised was a very serious one, and one that should be argued before the courts.

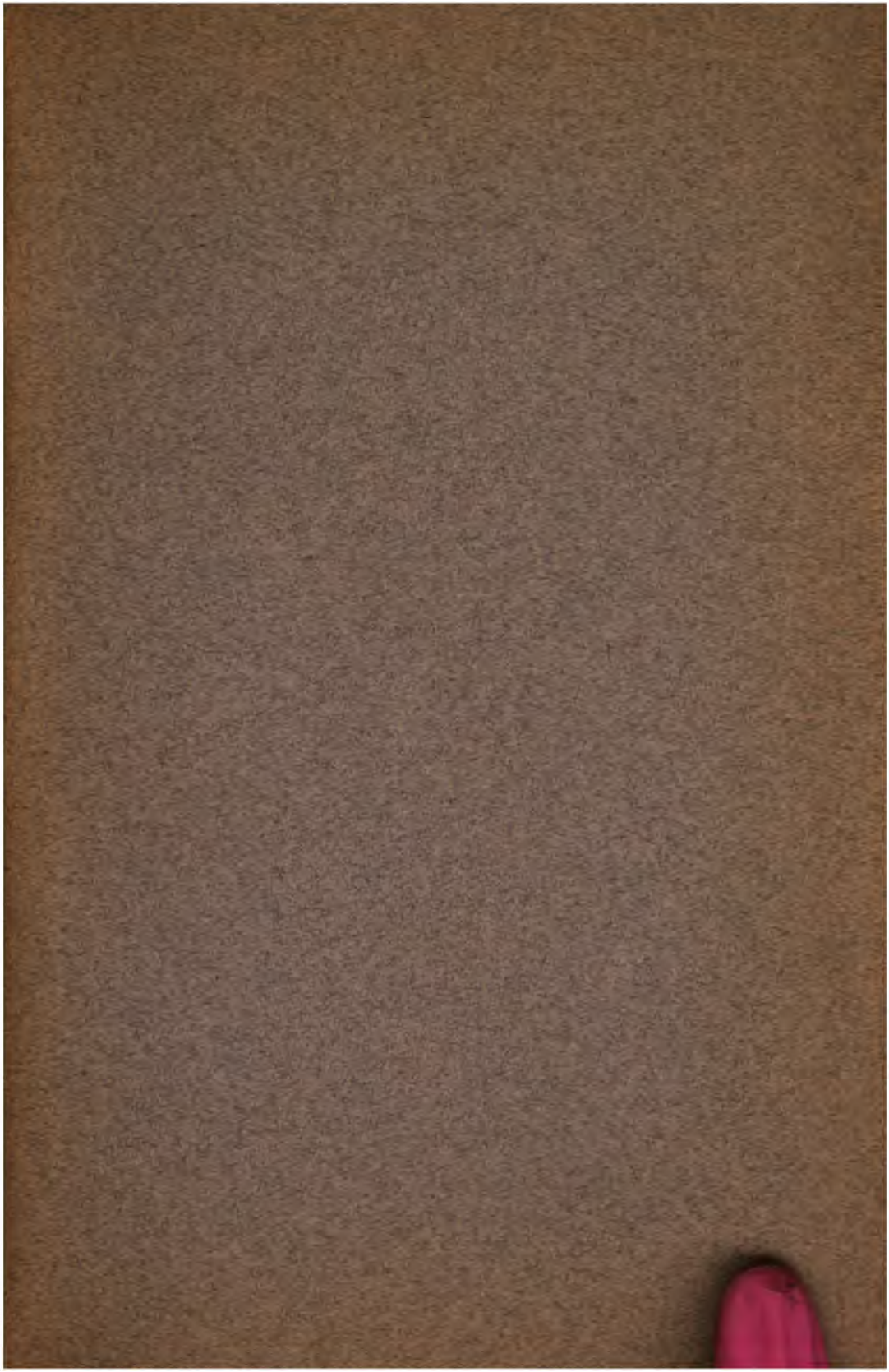
We are convinced that the commissioner has jurisdiction, that his appointment is valid, that the Superior Court cannot intervene. Under such circumstances, an intervention on our part would hamper the commissioner and would trammel justice.

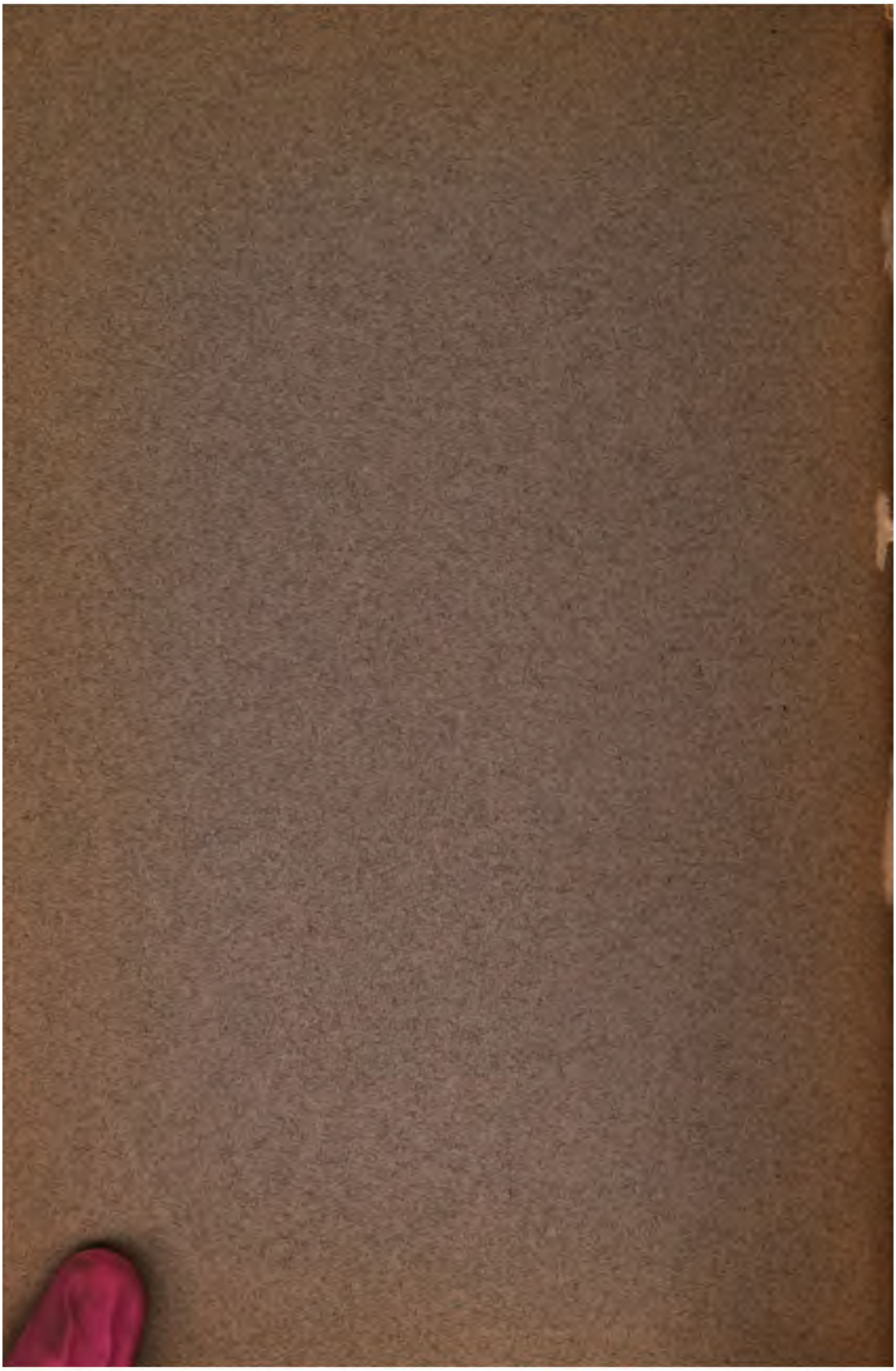
The appeal is not allowed.

Mr. Commissioner Lafontaine filed no plea, but "submitted himself to justice."

Upon the argument before the Court of Appeal, the United States was represented by Messrs. Donald Macmaster, K.C., and G. G. Stuart, K.C. They filed special pleadings, the substantial parts of which were adopted by the Superior Court and the Court of Appeal. The counsel for the accused on the appeal were Messrs. T. C. Casgrain, K.C., and Alexander Taschereau, K.C.

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